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DRUG LAWS

1986 EDITION

MICHAEL S. DUKAKIS
Governor

CHARLES V. BARRY
Secretary of Public Safety

GARY F. EGAN
Executive Director

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The Controlled Substances Act

Mass. General Laws, Chapter 94C

AND

The Drug Rehabilitation Act

Mass. General Laws, Chapter 111E

Sections 1 - 18

Updated through February 28, 1986

FOREWORD

The Massachusetts Criminal Justice Training Council is providing this book as a ready reference source for the students in its Drug Education programs and Basic Police Recruit academies. This 1986 edition is an update of earlier versions prepared by the Training Council in 1981 and 1979 and by the Norfolk County District Attorney's Office in 1975.

Research for this edition was conducted by members of the Suffolk County District Attorney's Drug Unit. It was edited by Attorneys Charles F. Ahern and Augusto Grace, members of the Council staff.

The Council's statutory mission is to fulfill the training needs of the Massachusetts criminal justice community. This book has been prepared to satisfy that need as it pertains to the growing and pernicious specter of drug abuse and enforcement of the law. Suggestions for improvement in future editions are welcome and may be addressed to the Council's Executive Director.

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Governor

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Chairman, MCJTC

CHARLES V. BARRY
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TABLE OF CONTENTS

INTRODUCTION TO CHAPTER 94C Chapter 94C-The Controlled Substances Act

Section 1	Definitions.	12
Section 2	Powers and duties of Commissioner. Directs the Commissioner of Public Health to set up administrative schedules of controlled substances according to the Federal Comprehensive Drug Abuse Prevention and Control Act, and enumerates the criteria necessary for classification.	18
Section 3	Schedule of Controlled Substances. Further finding necessary for administrative scheduling.	20
Section 4	Certain compounds, etc, may be excepted by regulation; conditions. Criteria for excepting drugs from the administrative schedules.	22
Section 5	Conditions for dispensation, sale, etc. of excepted controlled substances. Regulations on the sale and record-keeping of excepted drugs.	22
Section 6	Rules and Regulations. Authority of the Board of Registration in Pharmacy (in the case of retail drug businesses and wholesale druggists) and the Commissioner of Public Health, in all other cases, to regulate the manufacture, distribution, and possession of drugs.	23
Section 7	Registration. Provisions for an automatic one year, renewable registration for the manufacture, distribution, dispensing or possession of drugs by the Commissioner of Public Health, and a two year renewable registration for pharmacies by the Board of Registration in Pharmacy. Those persons exempted: —common carriers —contract carriers —warehousemen —law enforcement officers —patients and research subjects —agents of manufacturers, distributors or dispensers, except that these persons may not possess Schedule I-V drugs for the purpose of distribution of samples to practitioners.	23

Table of Contents (continued)

Section 8	Regulation of research and study projects involving certain drugs.	27
	Persons doing research with narcotic drugs in Schedule II (opiates, cocaine, methadone, amphetamine, etc.) or with drugs which have not been approved for safety and effectiveness by the Federal Food and Drug Administration for use on human beings must file evidence of their federal research protocols with the Commissioners of Public and Mental Health. The Commissioner of Public Health may promulgate rules governing the standards and records such researchers must maintain. If these are violated, he may terminate the researcher's protocol. Informed consent of the research subject is a condition of any protocol.	
Section 9	Authorized possession, dispensation, etc. of controlled substances; records.	29
	Doctors may administer or dispense only that amount of drug to a patient as may be needed until the patient is able to fill a prescription. Doctors shall keep records of all Schedule I, II, or III drugs in their possession (opiates, methadone, amphetamines, barbituric acid, and high dosage levels of codeine) and the identities of the patients to whom they are administered.	
Section 10	Separate registration required for each principal place of business or practice , etc.	31
	Individual place of business registrations.	
Section 11	Inspection.	31
	Inspection rights of the Commissioner of Public Health and the Board of Registration in Pharmacy.	
Section 12	Issuance of registration; determination of public interest.	31
	Criteria for denial of practitioner or pharmacy registration.	
Section 13	Revocation and suspension of registration; grounds, etc.	32
	Criteria for revocation, modification, or suspension of registration.	

Table of Contents (continued)

Section 14	Suspension or refusal to renew upon finding of imminent danger to public health, etc.; duration. Criteria for revocation, modification or suspension of registration.	34
Section 15	Records and Inventories. Compliance provisions for federal record-keeping and inventory requirements.	34
Section 16	Order Forms. Distribution of Drugs by federal order form.	34
Section 17	Prescriptions, written or oral. Except in emergencies, Schedule II controlled substances may be dispensed only by written prescription, other drugs by a written or oral prescription. Drugs may be prescribed only by a practitioner.	34
Section 18	Prescriptions, who may issue. Same as Section 17.	35
Section 19	Authorized purposes for which prescriptions may be issued. Definition of a proper prescription. Unless permitted by federal law, this section prohibits the dispensing of drugs or controlled substance to a drug-dependent person in maintenance programs.	35
Section 20	Pharmacist to reduce oral prescription to writing, etc. Oral prescription procedures. Duties of pharmacist and practitioner.	37
Section 21	Filling of prescription; required information on label. Pharmacist's packaging and labelling procedures.	37
Section 22	Practitioner prescribing or dispensing controlled substance; information required. Practitioner's dispensing procedures.	38
Section 23	Further regulation of prescriptions Prescriptions for Schedule II substances are valid for five days, are to contain no more than a 30 day supply, and are not refillable. Schedule III drugs are also subject to 30 day supply limit. Prescriptions other than for Schedule II drugs are to state that they are to be refilled on the initial prescription.	38

Table of Contents (continued)

Section 24	Certain controlled substances dispensed for research, reports and records, etc.; failure to report; penalties; rules and regulations.	39
	The names and addresses of research subjects and persons being treated for drug dependency, and the names and amounts of the drugs they receive, are to be sent to the Commissioners of Mental and Public Health. These records are not open to the police. The Commissioner of Mental Health may promulgate rules to prevent patients and research subjects from obtaining drugs from multiple sources. Those physicians treating a case of acute poisoning are required to make a report but shall not report the identity of any person without his consent.	
Section 25	Prohibited acts. Further rules regarding registrants.	41
Section 26	Other prohibited acts. Further rules regarding registrants.	41
Section 27	Possession, delivery, sale, etc., of hypodermic syringe, needle, etc., regulated; prescriptions, records, etc; licenses. Only certain persons may possess; physicians may prescribe such instruments; conditions and requirements of such prescriptions. Licensing requirements.	42
Section 28	Injunctions.	44
Section 29	Education and research. The duties of the Commissioner of Mental Health regarding educational programs, research studies, and contract privileges.	44
Section 30	Administrative inspection warrants; entry and inspection without warrant. Procedures governing administrative inspection warrants, to be executed by the Commissioner of Public Health, or, in the case of pharmacies, by the Board of Registration in Pharmacy, or by a police officer showing probable cause. Purpose, who may issue, affidavits, scope of search, duties of officer serving, authority of officer serving, conditions for searches without warrant.	46

Table of Contents (continued)

Section 31	Classification of controlled substances for purposes of establishing penalties. Enumerates the five classes (A-E) of drugs used to establish penalty structures. Drugs are classified according to decelerating abuse and harmfulness potential.	49
Section 32	Unauthorized manufacture, distribution, etc. of Class A substances; penalties.	55
Section 32A	Unauthorized manufacture, distribution, etc. of Class B substances; penalties.	56
Section 32B	Unauthorized manufacture, distribution, etc. of Class C substances; penalties.	57
Section 32C	Unauthorized manufacture, distribution, etc. of Class D substances; penalties.	58
Section 32D	Unauthorized manufacture, distribution, etc. of Class E substances; penalties.	58
Section 32E	Unauthorized trafficking in marijuana, cocaine, heroin, etc; penalties.	59
Section 32F	Unauthorized manufacture, distribution, etc. of Class A substances to minors; penalties.	62
Section 32G	Unauthorized manufacture, distribution, etc. of counterfeit substances; penalties.	63
Section 32H	Mandatory terms imprisonment; eligibility for parole, etc.	63
Section 33	Use of fictitious, revoked, etc., registration number, uttering false prescription, and acquisition of controlled substance by fraud, forgery, non-disclosure, etc., prohibited; penalties. Penalties for -- use of a revoked, suspended, false or fictitious registration number, or -- false prescription.	64
Section 34	Unauthorized possession; penalties; dismissal and sealing of record in certain cases of first offense. Possession penalties, and provisions for probation and record sealing for first offenders. Non-disclosure of sealed record not a basis for Perjury charge.	65

Table of Contents (continued)

Section 35	Presence where heroin is kept or in company of person in possession of heroin prohibited; penalties.	67
Section 36	Protective custody of child found where controlled substances kept. Four-hour, non-criminal, protective custody provision for minors under 17 years of age found in the presence of Class A, B, or C controlled substances.	67
Section 37	Stealing controlled substance; penalties. Penalty for theft of a controlled substance.	67
Section 38	Violation of subsection (a) of section 24, or sections 25, 26, 27; penalties.	68
Section 39	Violation of sections 21, 22; penalties.	68
Section 40	Conspiracy to violate chapter; penalties.	68
Section 41	Arrest without warrant. Right of a police officer to arrest without a warrant for violations committed either in his presence, or on probable cause.	69
Section 42	Cooperative arrangements. Cooperation provisions between the Commissioner of Public Health and the Attorney General.	69
Section 43	Conformity with federal law. Practitioner conformity with federal law.	69
Section 44	Sealing of record upon dismissal, finding of not guilty, etc.; effect of sealing. Sealing provisions for persons found not guilty, or who have had their cases dismissed or nolprossed. Legal status of those persons.	70
Section 45	Effect of felony charge. Fingerprinting and photographing provisions for felons at time of arrest.	70
Section 46	[Repealed.]	70
Section 47	Forfeitures. Forfeiture of drugs and related property, including conveyances used in drug traffic. The maintaining of proper records of destruction.	70

Table of Contents (continued)

Section 47A	Custodian of seized drugs and controlled substances; chemical analyses; destruction or disposal of controlled substances after disposition of case.	74
	Requires the appointment of an officer in each police department to be custodian of seized drugs.	
Section 48	Severability.	76
	The invalidity of any provision in this chapter does not affect the validity of the other provisions.	
RELATED STATUTES		76
Chapter 94, Section 187D		76
Penalty to violations of sections 186-195.		76
Chapter 276, Section 3		77
Disposition of property seized.		77
Chapter 277, Section 38		77
Allegations, assumptions, and proof in prosecutions.		77
Chapter 111E		78
Drug Rehabilitation		78
Section 1	Definitions.	78
Section 2.	Division of drug rehabilitation; functions; director; powers and duties, etc.	80
Section 3.	Drug rehabilitation advisory board; membership; terms of office, etc.	81
Section 4	Preparation, etc., of plans for treatment of drug dependent persons.	81
Section 5	Establishment of treatment program; facilities to be provided, etc.	82
Section 6	Rehabilitation division; powers and duties.	83
Section 7	Licensing of private facilities.	85

Table of Contents (*continued*)

Section 8	Admission of drug dependent persons to facilities.	87
Section 9	Admission of drug dependent persons to facilities; emergency treatment.	89
Section 10	Assignment of defendants charged with drug offenses to treatment centers; disposition of criminal charges, etc.	89
Section 11	Commitment of persons found guilty of law violations other than drug offenses, etc.	94
Section 12	Commitment as condition of probation; breach of probation.	95
Section 13	Acceptance of certain juveniles and youthful offenders for treatment.	95
Section 14	Court's findings and orders to be in writing, etc.	97
Section 15	Director's authority to require facilities to admit patients.	97
Section 16	Persons receiving treatment to be under administrator's supervision.	97
Section 17	Liability for cost of maintenance and treatment.	97
Section 18	Rights of patients in facilities, etc.	98

APPENDIX

Classes of Controlled Substances	i
Penalty Structure	iv
Chapter 94C: Case Annotations	vii
Notes on Search and Seizure Laws	ix

INTRODUCTION TO CHAPTER 94C

This chapter, commonly known as the Controlled Substance Act, is the basic law in the Commonwealth of Massachusetts which regulates drugs. The first twenty-nine sections refer generally to the regulation of the legal sale of drugs. Although most police officers will not commonly deal with these sections, they should have a familiarity with them.

Sections thirty through forty-eight provide the basic criminal penalty structure for the illegal sale and possession of drugs. In particular, section thirty-one classifies the various drugs for criminal penalty purposes into five classes; Class A to Class E. These classes are arranged in a descending order of seriousness; Class A being the most serious and Class E being the least serious. Section thirty-two through section thirty-five set out the various penalties for distribution, possession with intent to distribute, trafficking, and possession of the various classes of drugs.

A police officer should be aware that several of these statutes have been substantially changed within the last three years. This is especially true with regard to section thirty-two and section thirty-two E. The following version of 94C is updated to March of 1986. However, a police officer who does much narcotics work should keep himself informed as to any changes in the law.

The reader should note that M.G.L. Chapter 123, Sections 38 to 55 were repealed by St. 1981, Chapter 784, section 1. These sections were replaced by M.G.L. Chapter 111E Sections 1-18. These sections deal with drug rehabilitation. The most important section of this chapter for law enforcement purposes is section 10. This section provides for alternative treatment for drug offenders under certain circumstances.

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CHAPTER 94C

The Controlled Substances Act

Section 1. Definitions As used in this chapter, the following words shall, unless the context clearly requires otherwise, have the following meanings:

Administer, the direct application of a controlled substance whether by injection, inhalation, ingestion, or any other means to the body of a patient or research subject by —

- (a) a practitioner, or
- (b) a nurse at the direction of a practitioner in the course of his professional practice, or
- (c) an ultimate user or research subject at the direction of a practitioner in the course of his professional practice.

Agent, an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser; except that such term does not include a common or contract carrier, public warehouseman, or employee of the carrier or warehouseman, when acting in the usual and lawful course of the carrier's or warehouseman's business.

Bureau, the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, or its successor agency.

Class, the lists of controlled substances for the purpose of determining the severity of criminal offenses under this chapter.

Commissioner, the commissioner of public health.

Controlled substance, a drug, substance, or immediate precursor in any schedule or class referred to in this chapter.

Counterfeit substance, a substance which is represented to be a particular controlled drug or substance, but which is in fact not that drug or substance.

Deliver, to transfer, whether by actual or constructive transfer, a controlled substance from one person to another, whether or not there is an agency relationship.

Department, the department of public health.

Depressant or stimulant substance,

- (a) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid; or any derivative of barbituric acid which the United States Secretary of Health, Education, and Welfare* has by regulation designated as habit forming.
- (b) a drug which contains any quantity of amphetamine or any of its optical isomers; any salt of amphetamine or any salt of an optical isomer of amphetamine; or any substance which the United States Attorney General has by regulation designated as habit forming because of its stimulant effect on the central nervous system; or
- (c) lysergic acid diethylamide; or
- (d) any drug except marihuana which contains any quantity of a substance which the United States Attorney General has by regulation designated as having a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

Definitions
(continued)

Dispense, to deliver a controlled substance to an ultimate user or research subject or to the agent of an ultimate user or research subject by a practitioner or pursuant to the order of a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary for such delivery.

Distribute, to deliver other than by administering or dispensing a controlled substance.

Drug,

- (a) substances recognized as drugs in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States or official National Formulary, or any supplement to any of them;
- (b) substances intended for use in the diagnosis, cure, mitigation treatment, or prevention of disease in man or animals;
- (c) substances, other than food, intended to affect the structure, or any function of the body of man and animals; or
- (d) substances intended for use as a component of any article specified in clauses (a), (b) or (c), exclusive of devices or their components, parts or accessories.

*Now known as the Department of Health and Human Services.

Drug paraphernalia, all equipment, products devices and materials of any kind which are used or intended for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter.

In determining whether an object is drug paraphernalia, a court or other authority shall consider in addition to all other relevant factors, the following:

- (a) Statements by an owner or by anyone in control of the object concerning its use;
- (b) The proximity of the object, in time and space, to a direct violation of this chapter;
- (c) The proximity of the object to controlled substances;
- (d) The existence of any residue of controlled substances on the object;
- (e) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to sell it to persons intending to use the object to facilitate a violation of this chapter, whether or not the owner, or anyone in control of the object, knows that the object is used or intended for use, as drug paraphernalia in a direct violation of this chapter.
- (f) Instructions, oral or written, provided with the object concerning its use;
- (g) Descriptive materials accompanying the object which explain or depict its use;
- (h) National and local advertising concerning its use;
- (i) The manner in which the object is displayed for sale;
- (j) Whether the owner, or anyone in control of the object, is a supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
- (k) Direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;

Definitions
(continued)

- (l) The existence and scope of legitimate uses for the object in the community;
- (m) Expert testimony concerning its use.

Immediate precursor, a substance which the commissioner has found to be and by rule designates as being a principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture.

Isomer, the optical isomer, except that wherever appropriate it shall mean the optical, position or geometric isomer.

Manufacture, the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, including any packaging or repackaging of the substance or labeling or relabeling of its container except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging, or labeling of a controlled substance:

- (a) by a practitioner as an incident to his administering a controlled substance in the course of his professional practice, or
- (b) by a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching or chemical analysis and not for sale, or
- (c) by a pharmacist in the course of his professional practice.

Marihuana, all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; and resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil, or cake made from the seeds of the plant, any other compound, manufacture, salt derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil, or cake or the sterilized seed of the plant which is incapable of germination.

Narcotic drug, any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

- (a) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate;
- (b) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (a), but not including the isoquinoline alkaloids of opium;
- (c) Opium poppy and poppy straw;
- (d) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

Definitions
(continued)

Nurse, a nurse registered or licensed pursuant to the provisions of section seventy-four or seventy-four A of chapter one hundred and twelve, a graduate nurse as specified in section eighty-one of said chapter one hundred and twelve or a student nurse enrolled in a school approved by the board of registration in nursing.

Nurse Practitioner, a nurse with advanced training who is authorized to practice by the board of registration in nursing as a nurse practitioner as provided for in section eighty B of chapter one hundred and twelve.

Opiate, any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under section two, the dextrorotatory isomer of 3-methoxyn-methyl-morphinan and its salts, dextromethorphan. It does include its racemic and levorotatory forms.

Opium poppy, the plant of the species *Papaver somniferum* L., except its seeds.

Oral prescription, an oral order for medication which is dispensed to or for an ultimate user, but not including an order for medication which is dispensed for immediate administration to the ultimate user by a practitioner, registered nurse, or practical nurse.

Person, individual, corporation, government, or governmental sub-division or agency, business trust, estate, trust, partnership or association or any other legal entity.

Pharmacist, any pharmacist registered in the commonwealth to dispense controlled substances, and including any other person authorized to dispense controlled substances under the supervision of a pharmacist registered in the commonwealth.

Pharmacy, a facility under the direction or supervision of a registered pharmacist which is authorized to dispense controlled substances, including but not limited to retail drug business as defined below.

Physician assistant, a person who is a graduate of an approved program for the training of physician assistants who is supervised by a registered physician in accordance with sections nine C to nine H, inclusive of chapter one hundred and twelve.

Poppy straw, all parts, except the seeds of the opium poppy, after mowing.

Practitioner,

- Definitions
(continued)
- (a) A physician, dentist, veterinarian, podiatrist, scientific investigator, or other person registered to distribute, dispense, conduct research with respect to, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research in the commonwealth;
 - (b) A pharmacy, hospital, or other institution registered to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in the commonwealth.

Prescription drug, any and all drugs upon which the manufacturer or distributor has, in compliance with federal law and regulations, placed the following: Caution, Federal law prohibits dispensing without prescription.

Production, includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

Registrant, a person who is registered pursuant to any provision of this chapter.

Registration, unless the context specifically indicates otherwise, such registration as is required and permitted only pursuant to the provisions of this chapter.

Definitions
(concluded)

Registration number, such registration number or numbers, either federal or state, that are required with respect to practitioners by appropriate administrative agencies.

Retail drug business, a store for the transaction of drug business as defined in section thirty-seven of chapter one hundred and twelve.

Schedule, the list of controlled substances established by the commissioner pursuant to the provisions of section two for purposes of administration and regulation.

State, when applied to a part of the United States other than Massachusetts includes any state, district, commonwealth, territory, insular possession thereof, and any area subject to the legal authority of the United States of America.

Tetrahydrocannabinol, tetrahydrocannabinol or preparations containing tetrahydrocannabinol excluding marihuana except when it has been established that the concentration of delta-9 tetrahydrocannabinol in said marihuana exceeds two and one-half per cent.

Ultimate user, a person who lawfully possesses a controlled substance for his own use or for the use of a member of his household or for the use of a patient in a facility licensed by the department or for administering to an animal owned by him or by a member of his household.

Written prescription, a written order for medication which is dispensed to or for an ultimate user, but not including an order for medication which is dispensed for immediate administration to the ultimate user by a practitioner, registered nurse or practical nurse.

Section 2. Powers and duties of Commissioner

- (a) For the purpose of administration and regulation of the manufacture, distribution, dispensing, and possession of controlled substances by persons authorized under this chapter, the commissioner shall establish by regulations pursuant to the provisions of chapter thirty A five schedules incorporating the five schedules of controlled substances under the Comprehensive Drug Abuse, Prevention and Control Act of 1970 or any amendment thereof. In addition thereto the commissioner shall by regulation as aforesaid establish a sixth schedule which shall include all prescription drugs not included in the first five schedules.

Commissioner required to establish schedules consistent with Federal law

Commissioner required to establish schedules consistent with Federal Law

(a 1/2) The commissioner may, pursuant to the provisions of chapter 30-A, delete or reschedule all substances enumerated in the schedules established pursuant to the provisions of subsection (a) except that if any substance which has not been scheduled pursuant to the provisions of this section is designated a controlled substance under the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970 or any amendment thereof, or if any substance which has been scheduled pursuant to the provisions of this section is designated a controlled substance of greater abuse liability under the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970 or any amendment thereof, the commissioner, pursuant to the provisions of chapter thirty A, shall, not more than thirty days after publication of final notice in the federal register or not more than thirty days after the effective date of any federal statute affecting the scheduling of controlled substances under said federal act or any amendment thereof, issue a regulation controlling the substance in a schedule corresponding to the federal schedules.

Criteria for Classification

(b) In making any finding under subsection (a) of this section or under subsection (a) of section three, the commissioner shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

- (1) Its actual or relative potential for abuse.
- (2) Scientific evidence of its pharmacological effect, if known.
- (3) The state of current scientific knowledge regarding the drug or other substance.
- (4) Its history and current pattern of abuse.
- (5) The scope, duration and significance of abuse.
- (6) What, if any, risk there is to the public health.
- (7) Its psychological or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this chapter.

(c) The commissioner acting jointly with the board of registration in pharmacy shall by regulation pursuant to the provisions of chapter thirty A exclude any non-narcotic substance from a schedule if such substance may, under the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970 and the Food, Drug, and Cosmetic Act, be lawfully sold over the counter without a prescription.

Alcoholic
beverages
and
tobacco
excluded from
Ch. 94C

(d) Authority to control under this section shall not extend to distilled spirits, wine, malt beverages or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1954.

Section 3. Schedules of Controlled Substances. Except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless such drug or substance has been scheduled pursuant to the provisions of the Federal Comprehensive Drug Abuse, Prevention and Control Act of 1970, or any amendment thereof, or unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) SCHEDULE I. —

- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
- (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) SCHEDULE II. —

- (A) The drug or other substance has high potential for abuse.
- (B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

Findings
necessary for
each schedule

- (C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.
- (3) SCHEDULE III. —
- (A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.
 - (B) The drug or other substance has a currently accepted medical use in treatment in the United States.
 - (C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.
- (4) SCHEDULE IV. —
- (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.
 - (B) The drug or other substance has a currently accepted medical use in treatment in the United States.
 - (C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.
- (5) SCHEDULE V. —
- (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.
 - (B) The drug or other substance has a currently accepted medical use in treatment in the United States.
 - (C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.
- (6) SCHEDULE VI. —
- (A) The substance is a prescription drug; and
 - (B) Said prescription drug has not been included in Schedules I through V.

Section 4. Certain compounds, etc., may be excepted by regulation, conditions. The commissioner acting jointly with the board of registration in pharmacy may by regulation pursuant to the provisions of chapter thirty A except any compound, mixture or preparation containing any substances in paragraph (a) or (b) of Schedule III or in Schedule IV, V or VI established pursuant to the provisions of section two from the application of all or any part of this chapter if

- (1) the compound, mixture, or preparation contains one or more active medicinal ingredients not having a depressant or stimulant effect on the central nervous system, and
- (2) such ingredients are included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse of the substances which do have a depressant or stimulant effect on the central nervous system, and
- (3) the compound, mixture, or preparation has been similarly excepted under the provisions of the Federal Comprehensive Drug Abuse, Prevention and Control Act of 1970, or any amendment thereof.¹

Such regulation shall state the weight of the controlled substance per fluid ounce, or if a solid or semisolid preparation the weight in the avoirdupois amounts, and if the metric system is used, the weight in grams per hundred cubic centimeters in the case of a fluid, or the weight per gram in the case of a solid or semi-solid preparation.

The commissioner shall by regulation modify, rescind or revoke an exception whenever it has been modified, rescinded or revoked under the provisions of the Federal Comprehensive Drug Abuse, Prevention and Control Act of 1970 or any amendment thereof.²

Section 5. Conditions for dispensation, sale, etc. of excepted controlled substance. Controlled substances which are excepted pursuant to section four may be dispensed, or sold at retail, except that the exception authorized by this section shall be subject to the following conditions:

¹ (See 21 U.S.C.A. section 812.)

² (See 21 U.S.C.A. section 812.)

- (1) that such preparation shall be dispensed or sold in good faith as medicine, and not for the purpose of evading the provisions of the controlled substances law; (2) that the purchaser of such preparation identify himself to the satisfaction of the pharmacist; and (3) that of such preparation not more than four ounces are dispensed, or sold to a person during any 48 hour period.

The pharmacist dispensing such excepted substances shall keep an accurate record book including the name and address of the purchaser, the name of the preparation, the strength per dosage unit, the quantity dispensed and the date.

Section 6. Rules and Regulations. The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases may promulgate rules and regulations relative to registration and control of the manufacture, distribution, dispensing and possession of controlled substances within the commonwealth.

Section 7. Registration.

- Manu-
facturers and
Wholesale
Druggists**
- (a) Except in the case of a pharmacy or wholesale druggist, every person who manufactures, distributes or dispenses or possesses with intent to manufacture, distribute, or dispense any controlled substance within the commonwealth shall upon payment of a fee, the amount of which shall be determined annually by the commissioner of administration under the provision of section three B of chapter seven, register with the commissioner of public health, in accordance with his regulations, said registration to be effective for one year from the date of issuance. Every wholesale druggist shall register with the board of registration in pharmacy in accordance with its regulations. Such registration shall be effective until July first, nineteen hundred and seventy-four, if such registration is issued prior to July first, nineteen hundred and seventy-four. Such registration shall be effective until January first, nineteen hundred and seventy-six, if such registration is issued between July first, nineteen hundred and seventy-four, and January first, nineteen hundred and seventy-six. Such registration shall be effective until the end of the calendar year in which said registration is issued if registration is issued subsequent to December thirty-first, nineteen hundred and seventy five; provided, that such wholesale druggist shall pay a registration fee of twenty-five dollars for any initial registration issued prior to July first, nineteen hundred and seventy-four, and shall pay any registration fee of thirty-seven dollars and fifty cents for a registration which is issued between July first, nineteen hundred and seventy-four, and January first, nineteen hundred and seventy-six. Such wholesale druggist shall commencing January first, nineteen hundred and seventy-six, pay an annual registration fee, the amount of which shall be determined by the commissioner of administration, for each year or any part thereof. For the purposes of this section, wholesale druggist shall mean any person who

Registration
Fees distributes controlled substances at wholesale. Every pharmacy shall register with the said board in accordance with its regulations. Such registration shall be effective until July first, nineteen hundred and seventy-four, if any registration is issued prior to July first, nineteen hundred and seventy-four. Such registration shall be effective until January first, nineteen hundred and seventy-six, if such registration is issued between July first, nineteen hundred and seventy-four, and January first, nineteen hundred and seventy-six. Such registration shall be effective until the end of the first uneven numbered year following the date of issuance of such registration if such registration is issued subsequent to December thirty-first, nineteen hundred and seventy-five; provided, that such pharmacy shall pay a registration fee of twenty-five dollars for an initial registration issued prior to midnight of July first nineteen hundred and seventy-four, and shall pay a registration fee of thirty-seven dollars and fifty cents for any registration issued between July first, nineteen hundred and seventy-four, and January first, nineteen hundred and seventy-six, and shall, commencing January first, nineteen hundred and seventy-six, pay a biennial registration fee, the amount of which shall be determined by the commissioner of administration, for every two years, or any part thereof.

- (b) Every person who is engaged in the qualitative or quantitative analysis of controlled substances within a scientific laboratory shall, upon payment of a fee as determined annually by the commissioner of administration under the provisions of section three B of chapter seven, obtain a registration issued by the commissioner in accordance with his rules, said registration to be effective for one year from date of issuance.
- (c) A person registered under this chapter to manufacture, distribute, dispense, or possess controlled substances may possess, manufacture, distribute, or dispense those substances to the extent authorized by his registration and in conformity with the other provisions of this chapter.
- (d) The following persons shall not require registration and may lawfully possess and distribute controlled substances:
 - (1) an agent or employee of any manufacturer, distributor, or dispenser registered under this chapter, if he is acting in the usual course of his business or employment, except that a salesman, detail man or other field representative of a registered manufacturer, wholesaler, jobber or dealer in controlled substances may not possess any controlled substance in schedule I, II, III, IV, and V of section three for the purpose of demonstrating, displaying, selling or distributing as samples said controlled substances to a practitioner;
 - (2) a common or contract carrier or warehouseman, or an employee thereof, whose possession of any controlled substance is in the usual course of business or employment;

- (3) any public official or law enforcement officer acting in the regular performance of his official duties.
- (4) a registered nurse or licensed practical nurse when acting under the supervision of a practitioner;
- (5) a graduate of a school for nurses or practical nurses which has been approved in accordance with the provisions of chapter one hundred and twelve, whenever said person is acting

under the supervision of a practitioner and is engaged in professional practice during the period from such person's graduation from said school until the announcement of the results of the first licensing examination for registered nurses or licensed practical nurses, as the case may be, thereafter held in accordance with the provisions of said chapter one hundred and twelve;

- (6) any person duly licensed to practice nursing within any other jurisdiction, whenever such person is acting under the supervision of a practitioner and is discharging official duties as an employee of the federal government;
 - (7) any person covered by clauses (1), (2), (3) and (5) of section eighty B of chapter one hundred and twelve when any such person is acting under the supervision of a practitioner;
 - (8) any therapist, technician, or medical student when performing under the supervision of a practitioner those services which are defined to be functions of their respective callings;
 - (9) any person who belongs to a class of persons which is authorized by regulation of the commissioner to provide services for the purpose of diagnosis, care, treatment, or research.
- (e) An ultimate user or research subject may lawfully possess or administer a controlled substance at the direction of a practitioner in the course of his professional practice.
- (f) Notwithstanding any other provision of this section, the commissioner shall, upon receipt of the fee as hereinbefore provided, automatically issue to any physician, dentist, podiatrist or veterinarian who is duly authorized to practice his profession in the commonwealth a registration to dispense, other than for research pursuant to section eight, unless the registration of such physician, dentist, podiatrist, or veterinarian has been suspended or revoked pursuant to the provisions of sections thirteen or fourteen or unless said registration is denied for cause by the

commissioner pursuant to the provisions of chapter thirty A. Such registration shall continue in full force and effect unless it is suspended or revoked, or unless it is recalled and a new registration issued in accordance with the rules and regulations of the commissioner.

- (g) The commissioner may by regulation authorize the registration for a specific activity or activities requiring registration under this section of such persons as he determines to be qualified for such registration.

The commissioner shall promulgate regulations which provide for the registration of nurse practitioners and physician assistants to issue written prescriptions for patients in long term care facilities or for chronic patients in home care settings where the individual would otherwise require institutionalization. Prior to promulgating such regulations, the commissioner shall consult with the board of certification and approval of physician assistant training programs, the board of registration in medicine and the board of registration in nursing with regard to those schedules of controlled substances for which nurse practitioners or physician assistants may be registered.

Section 8. Regulation of research and study projects involving certain drugs

- (a) No person shall carry out any research project or study involving any narcotic drug in Schedule II or the investigational use on human beings of any new drug as defined in section two hundred and one (p) of the Federal Food, Drug and Cosmetic Act, as amended, unless he supplies the commissioner and the commissioner of mental health with satisfactory evidence of compliance with any applicable federal law, and, if the commissioner so requires, with a protocol describing the research project or study to be undertaken.
- (b) The commissioner shall pursuant to the provisions of chapter thirty A promulgate rules and regulations establishing standards for such protocol and requiring, among such other conditions relating to the protection of the public health that the commissioner may prescribe, the establishment and maintenance of records and the making of reports to the commissioner of data, including but not limited to analytical reports by investigators, obtained as the result

of the investigational use of the drug. The commissioner may waive any or all such conditions with respect to a particular research project or study described in this section if he deems it consistent with the public interest.

- (c) The commissioner shall, after due notice and opportunity for hearing pursuant to the provisions of chapter thirty A, issue an order that such research project or study be terminated if the commissioner finds (1) that the drug under investigation is unsafe under the conditions of use; or (2) that the investigators lack the necessary training and experience to conduct such research project or study; or (3) that the research protocol contains any untrue statement of a material fact, provided, that if the commissioner finds that there is an imminent hazard to health he shall order that the research project or study be discontinued upon notice and afford those persons who are undertaking the research the opportunity for an expedited hearing. The commissioner may also, after due notice and opportunity for a hearing pursuant to the provisions of chapter thirty A order that a research project or study be discontinued if the commissioner finds (1) that the persons who are undertaking the research have failed to establish a system for maintaining required records, or have repeatedly or deliberately failed to maintain such records or to make reports which are required by the commissioner or the persons undertaking the research project or study have refused to permit access to or copying or verification of such records; or (2) the methods used in, or the facilities and controls used for the research project or study are inadequate to safeguard against unlawful diversion of the drug under investigation.

- Access to records
- (d) Every person who is required pursuant to the provisions of this section to maintain records, and every person in charge or custody thereof, shall, upon request of an officer or employee designated by the commissioner permit such officer or employee at all reasonable times to have access to and to copy and verify such records.

- Research on humans; consent required
- (e) No person who undertakes research pursuant to the provisions of this section shall use as a subject for such research any human being unless such subject or his legal representative has given in writing his informed consent based upon information about the nature, duration and purpose of the investigation; the

method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon the subject's health or person which may reasonably be expected to come from his participation.

- (f) A person who is conducting research pursuant to the provisions of this section may to the extent authorized by the commissioner and in conformity with the provisions of this section dispense any drug for investigational use without an oral or written prescription.
- (g) Notwithstanding any other provision of this section, the administering or dispensing directly or prescribing of narcotic drugs listed in any schedule to a narcotic drug dependent person for the purpose of continuing his dependence upon such drugs in the course of conducting an authorized clinical investigation pursuant to a narcotic addict rehabilitation program shall be deemed to be within the meaning of the term "in the course of professional practice" as used in this chapter, provided, that federal approval, if such approval is required by federal law, is obtained prior to the initiation of such a program, and satisfactory evidence of such approval is submitted to the commissioner.
- (h) Notwithstanding the provisions of paragraphs (a) to (g), inclusive, this section shall not apply to any drug recognized as safe and which has been exempted by section one hundred and seven of the Federal Drug Amendments Act of 1962 from the operation of sections two hundred and one (p) and five hundred and five of the Federal Food, Drug and Cosmetic Act, as amended.
- (i) Whoever knowingly or intentionally violates any provision of this section shall be punished for each offense by imprisonment in a jail or house of correction for not more than one year or by a fine of not more than one thousand dollars, or both.

Section 9. Authorized Possession, Dispensation, etc. of Controlled Substance; records

- (a) A physician, dentist, podiatrist, nurse practitioner as limited by paragraph (g) of section seven of this chapter and section eighty E of chapter one hundred and twelve and physician assistant as limited by said

paragraph (g) of said section seven and section nine E of said chapter one hundred and twelve, or veterinarian when registered pursuant to the provisions of said section seven and when acting conformably with the provisions of applicable federal law and any provisions of this chapter which are consistent with federal law, in good faith and in the course of his professional practice for the alleviation of pain and suffering or for the treatment or alleviation of disease, may possess such controlled substances as he may reasonably require for the purpose of patient treatment and may administer controlled substances, or he may cause the same to be administered under his direction by a nurse.

- (b) Notwithstanding the provisions of section seventeen, a physician, dentist, podiatrist, or veterinarian who is registered pursuant to the provisions of said section seven, when acting in good faith and in the legitimate practice of medicine, dentistry, podiatry or veterinary medicine, or a nurse when authorized by a physician, dentist, podiatrist, nurse practitioner, physician assistant or veterinarian in the course of said nurse's professional practice, may dispense by delivering to an ultimate user a controlled substance in a single dose or in such quantity as is the opinion of the physician, dentist, podiatrist, nurse practitioner, physician assistant or veterinarian is essential for the proper treatment of the patient, provided, however, that such amount or quantity of said controlled substance shall not exceed the amount needed for the immediate treatment of the patient and that all further such controlled substances required by the person as part of his treatment shall be dispensed by prescription to the ultimate user in accordance with the provisions of this chapter.

For purposes of this subsection the words "immediate treatment" shall mean that quantity of a controlled substance which is necessary for the proper treatment of the patient until it is possible for him to have a prescription filled by a pharmacy.

- (c) A nurse who has obtained from a physician, dentist, podiatrist or veterinarian a controlled substance for dispensing to an ultimate user pursuant to the provisions of subsection (b) or for administration to a patient pursuant to the provisions of subsection (a) during the absence of such physician, dentist, podiatrist, or veterinarian shall return to such physician, dentist, podiatrist, or veterinarian any unused portion of such substance which is no longer required by the patient.

Records to
be main-
tained;
inspection

- (d) Every physician, dentist, podiatrist, or veterinarian shall in the course of his professional practice keep and maintain records, open to inspection by the commissioner during reasonable business hours, which shall contain the names and quantities of any controlled substance in Schedule I, II, or III received by the practitioner; the name and address of the patient for whom the controlled substance is administered or dispensed; the name, dosage, and strength per dosage unit of such controlled substance; and the date of administration or dispensing.

Section 10. Separate Registration Required for Each Principal Place of Business or Practice, etc. A separate registration shall be required at each principal place of business or professional practice where the registrant manufactures, distributes, or dispenses controlled substances.

Section 11. Inspection. The board of registration in pharmacy in the case of a pharmacy and the commissioner in any case may inspect in accordance with his or its rules or regulations the establishment of a registrant or applicant for registration pursuant to the provisions of this chapter.

Section 12. Issuance of Registration: Determination of Public Interest.

(a) The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases shall register an applicant to manufacture or distribute controlled substances included in the schedules established pursuant to section two unless he determines that the issuance of that registration would be inconsistent with the public interest. In determining the public interest, the board of registration in pharmacy in the case of a retail drug store or a wholesale druggist and the commissioner in all other cases shall consider the following factors:

Manufac-
turers and
distributors

- (1) maintenance of effective controls against diversion of controlled substances into other than legitimate medical, scientific, or industrial channels;
- (2) compliance with applicable federal, state and local law;
- (3) any conviction of the applicant under any federal and state law relating to any controlled substance;

- (4) past experience in the manufacture or distribution of controlled substances, and the existence in the applicant's establishment of effective controls against diversion;
 - (5) furnishing by the applicant of false or fraudulent material in any application filed under the provisions of this chapter;
 - (6) suspension or revocation of the applicant's federal registration to manufacture, distribute or dispense controlled substances as authorized by federal law; and
 - (7) any other factors relevant to and consistent with the public health and safety.
- (b) Registration under subsection (a) of this section shall not entitle a registrant to manufacture or distribute controlled substances in Schedules I or II established pursuant to the provisions of section two except to the extent specified in the registration.

Section 13. Revocation and suspension of registration, grounds, etc.

- (a) The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases may suspend or revoke a registration to manufacture, distribute, dispense or possess a controlled substance, after a hearing pursuant to the provisions of chapter thirty A upon a finding that the registrant:
- (1) has furnished false or fraudulent material information in any application filed under the provisions of this chapter;
 - (2) has been convicted under any state or federal law of any criminal violation relating to his fitness to be registered under this chapter;
 - (3) has had his federal registration suspended or revoked to manufacture, distribute, dispense, administer or possess controlled substances;
- or

Criteria for
Revocation

(4) is, upon good cause, found to be unfit or unqualified to manufacture, distribute, dispense, or possess any controlled substance.

(b) The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases may pursuant to the provisions of this section or section fourteen suspend or revoke any registration issued by him or it for violation of any provision of this chapter.

Referral of
Criminal
Violations

(c) Whenever the commissioner, the board of registration in pharmacy, or the commissioner of mental health has substantial reason to believe that a registrant has committed a criminal violation of any provision of this chapter, he or it shall promptly report all pertinent facts to the district attorney in the county where the violation is believed to have occurred, or to the attorney general.

(d) The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exists.

Embargo
and
Forfeiture
Proceedings

(e) If the board of registration in pharmacy in the case of a retail drug business or wholesale druggist or the commissioner in all other cases suspends or revokes a registration all controlled substances which are affected by such suspension or revocation order at the time of suspension or the effective date of revocation order shall be placed under embargo pursuant to the procedures prescribed in sections one hundred and eighty-nine and one hundred and eighty-nine A of chapter ninety-four. No disposition may be made of substances under such embargo until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application therefor, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all controlled substances may be forfeited to the commonwealth under the provisions of section forty-seven.

(f) The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases shall promptly notify the bureau of all orders suspending or revoking registration and all forfeitures of controlled substances.

Section 14. Suspension or refusal to renew upon finding of imminent danger to public health, etc.; duration. The board of registration in pharmacy in the case of a retail drug business or wholesale druggist or the commissioner in all other cases may without hearing suspend or refuse to renew any registration if he finds that there is an imminent danger to the public health or safety which warrants this action, provided he promptly affords the registrant an opportunity for a hearing under chapter thirty A. The suspension shall continue in effect until the conclusion of the proceedings including judicial review thereof, unless sooner dissolved by a court of competent jurisdiction, or withdrawn by the board of registration in pharmacy in the case of a retail drug business or wholesale druggist, or withdrawn by the commissioner in any other case.

Section 15. Records and inventories. Persons registered to manufacture, distribute, dispense, or possess controlled substances shall keep records and maintain inventories in conformance with the record-keeping and inventory requirements of the Federal Comprehensive Drug Prevention and Control Act of 1970 or any amendment thereof,³ and the Federal Food, Drug and Cosmetic Act,⁴ and with any additional rules or regulations promulgated by the board of registration in pharmacy in the case of a retail drug business or wholesale druggist or by the commissioner in all other cases.

Section 16. Order forms. Controlled substances in Schedules I and II shall be distributed by a registrant to another registrant only pursuant to such order form as may be required by the Federal "Comprehensive Drug Abuse Prevention and Control Act of 1970" or any amendment thereof and the Federal Food, Drug, and Cosmetic Act.

Section 17. Prescriptions, written or oral.

- (a) No controlled substance in Schedule II may be dispensed without the written prescription of a practitioner, except that —

³See 21 U.S.C.A. s827.

⁴See 21 U.S.C.A. s3

(See also *Commonwealth v. Perry*, 397 Mass. 808 (1984))

- (b) In emergency situations, as defined by rule or regulation of the commissioner acting jointly with the board of registration in pharmacy, drugs in said Schedule II may be dispensed upon oral prescription of a practitioner, reduced promptly to writing and filed by the pharmacy, pursuant to the provisions of subsection (a) of section twenty.
- (c) A controlled substance included in Schedule III, IV, V or VI shall not be dispensed without a written or oral prescription of a practitioner.

Section 18. Prescriptions, who may issue.

- (a) A prescription for a controlled substance may be issued only by a practitioner who is:
 - (1) authorized to prescribe controlled substances; and
 - (2) registered pursuant to the provisions of this chapter.
- (b) An oral prescription issued by a practitioner may be communicated to a pharmacist by an expressly authorized employee or agent of the practitioner.
- (c) A prescription for a controlled substance may also be issued by any physician who is licensed or registered in a contiguous state and who resides or practices in said state provided that such physician is registered with the commissioner subject to such rules and regulations as he may establish. Such registration shall be valid only for the purpose of authorizing the filling of prescriptions within the commonwealth and shall not authorize such physician to possess, administer or dispense controlled substances as provided in section nine, or to practice medicine within the commonwealth. Any prescription issued under this paragraph shall be issued in the manner prescribed in section twenty-two and all relevant provisions of this chapter shall apply to such physician and prescription.

Out-of-State
Physicians

Section 19. Authorized purposes for which prescriptions may be issued.

- (a) A prescription for a controlled substance to be valid shall be issued for a legitimate medical purpose by a practitioner acting in the usual course of his

Criminal
liability of
practitioners
and
pharmacists

professional practice. The responsibility for the proper prescribing and dispensing of controlled substances shall be upon the prescribing practitioner, but a corresponding responsibility shall rest with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section one and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided by section thirty-two, thirty-two A, thirty-two B, thirty-two C, thirty-two D, thirty-two E, thirty-two F, thirty-two G, and thirty-two H, as applicable.

- (b) No prescription shall be issued in order for a practitioner to obtain controlled substances for supplying the practitioner for the purpose of general dispensing to patients.
- (c) Unless permitted by federal law, a prescription shall not be issued for the dispensing of drugs or controlled substances as defined in section thirty-eight of chapter one hundred and twenty-three, listed in any schedule to a drug dependent person for the purpose of continuing his dependence upon such drugs, in the course of conducting an authorized clinical investigation pursuant to an addict rehabilitation program.⁵

Restrictions
on
Prescriptions

⁵The test in determining whether a doctor's conduct is criminal is whether the doctor, exercising his honest professional judgment as a physician, and acting in good faith believed the drugs prescribed by him were obviously needed for the treatment of the persons prescribed for, or whether he was in the business of issuing prescriptions to habitual drug users solely for his own pecuniary gain.

A doctor may treat a drug addict for his addiction with the use of narcotics whether or not he is afflicted with any other ailment or disease requiring drugs provided the drugs are prescribed in good faith and in legitimate practice.

Prescriptions need not be filled by undercover agents to establish the case against the prescriber. Dispense includes prescribing as well as administering.

To avoid raising the issue of entrapment do not engage in lengthy negotiations with the doctor, or plead or argue. When making an undercover purchase do not go beyond a simple request.

Section 20. Pharmacist to reduce oral prescription to writing, etc.

- (a) Upon receiving an oral prescription for a controlled substance from an authorized practitioner, the pharmacist shall immediately reduce the prescription to writing on a prescription form and shall record the name, address and registration number of the practitioner and the name of any expressly authorized representative, the date of the prescription, the name, dosage and strength per dosage unit of the controlled substance, the serial number assigned to the prescription by the dispensing pharmacy, the name of said pharmacy, the name and address of the patient unless it is a veterinary prescription, the directions for use and any cautionary statements required, and a statement indicating the number of times to be refilled.
- (b) If the prescribing practitioner is not known to the pharmacist, he shall make a reasonable effort to determine that the oral authorization came from a registered practitioner.
- (c) Whenever a practitioner dispenses a controlled substance by oral prescription, such practitioner shall, within a period of not more than seven days or such shorter period that is required by federal law cause a written prescription for the prescribed controlled substance to be delivered to the dispensing pharmacy. The prescription may be delivered to the pharmacy in person or by mail, but if delivered by mail the envelope shall be postmarked within the seven-day period or such shorter period that is required by federal law. Upon receipt, the dispensing pharmacy shall attach said prescription to the oral prescription which the pharmacy has reduced to writing. Persons charged with the enforcement of this chapter shall report violations of this subsection to the board of registration in medicine, the board of registration in dentistry, the board of registration in podiatry or the board of registration in veterinary medicine, whichever is applicable, and to the commissioner or board of registration in pharmacy, whichever is applicable.

Section 21. Filling of prescription. Required information or label. The pharmacist filling a written or oral prescription for a controlled substance shall package the controlled substance in a container, affixing to the container a label showing the date of filling, the pharmacy name and address, the filling pharmacist's initials, the serial number of the prescription, the name of the patient, unless it is a veterinary prescription, the name of the prescribing practitioner, the name of the controlled substance, and directions for use and cautionary statements, if any, contained in such prescription or required by law, and if the controlled substance is dispensed as tablets or capsules the number of same in such container.

Section 22. Practitioner prescribing or dispensing controlled substance. Information required.

- (a) A practitioner who dispenses a controlled substance by issuing a written prescription shall state on the prescription the name, address and registration number of the practitioner, the date of delivery of the prescription, the name, dosage and strength per dosage unit of the controlled substance, the name and address of the patient unless it is a veterinary prescription, the directions for use and any cautionary statements required, and a statement indicating the number of times to be refilled.
- (b) A practitioner who dispenses by delivering to an ultimate user a controlled substance which is not for immediate administration shall package the controlled substance in a container, affixing to the container a label bearing the practitioner's name and address, the date of dispensing, the name of the patient unless it is a veterinary prescription, the name, dosage and strength per dosage unit of the controlled substance, directions for use and any necessary cautionary statements.

Section 23. Further regulation of prescriptions.

- (a) A written prescription for a controlled substance in Schedule II shall become invalid five days after the date of issuance.
- (b) A written prescription for a controlled substance in Schedule II shall not be refilled and shall be kept in a separate file.
- (c) The pharmacist filling a written prescription for a controlled substance in Schedule II shall endorse his own signature on the face thereof.

- (d) In regard to a controlled substance in Schedule II or III, no prescription shall be filled for more than a thirty-day supply of such substance upon any single filling; provided, however, that with regard to dextro amphetamine sulphate and methyl phenidate hydrochloride, a prescription may be filled up to a sixty-day supply of such substance upon any single filling if said substance is being used for the treatment of minimal brain dysfunction or narcolepsy.
- (e) All prescriptions for controlled substances shall be kept for two years by the pharmacy and shall be subject to inspection pursuant to the provisions of this chapter.
- (f) No prescription for a controlled substance shall be refilled unless the original prescription provides for such refilling and unless the number of refills has been specified in said prescription.
- (g) A prescription shall be written in ink, indelible pencil or typewriter; and a written prescription shall be signed by the prescriber with his usual signature.

Section 24. Certain Controlled Substances dispensed for research; reports and records etc.; failure to report; penalties; rules and regulations.

- (a) A practitioner who dispenses a controlled substance in Schedule I, II, or III in the course of research conducted pursuant to the provisions of section eight or for the purpose of treating for his drug dependency a drug dependent person as defined in section thirty-eight of chapter one hundred and twenty-three shall report to the commissioner of mental health or his designee identifying information and the address of each research subject or patient to whom such controlled substance is dispensed, and the name, dosage and strength per dosage unit of the substance so dispensed. Said commissioner shall maintain records of each such report.
- (b) Such records maintained by the commissioner of mental health shall be closed to the public and shall not be available to any law enforcement officer for any

purpose, nor shall they be used in the criminal prosecution of such research subject or patient pursuant to any provision of this chapter, nor shall they be admissible in evidence against such research subject or patient in any criminal proceeding.

Failure to report; penalties

(c) If the commissioner of mental health determines that the research subject or patient is receiving any controlled substance from more than one source and in quantities which he determines to be harmful to the health of the research subject or patient, said commissioner shall so notify the practitioners who have dispensed the controlled substance.

(d) The commissioner of mental health shall report to the commissioner any failure of a practitioner to report the information required by the provisions of this section. The failure of a practitioner to report as aforesaid shall constitute sufficient grounds for the termination of the research project or study pursuant to the provisions of subsection (c) of section eight, or the revocation, suspension or modification of the practitioner's registration, or both.

Poisoning cases

(e) In order to prevent the dispensing of controlled substances to the same individual from multiple sources or the unlawful diversion of controlled substances, the commissioner of mental health shall pursuant to the provisions of chapter thirty A, after consultation with the commissioner of public health adopt rules and regulations for carrying out the provisions of this section.

Every physician attending or treating a case of acute poisoning caused by any controlled substance shall report the circumstances of such poisoning to the commissioner, provided, however, that such physician shall not report the identity of any person who has been so poisoned to the commissioner or to any law enforcement officer or agency for any purpose without the written consent of such person, nor shall the identity of such person be admissible in evidence against said person in any criminal proceeding. The commissioner may then require or conduct further investigation into the circumstances of such poisoning.

(g) This section shall not apply to a practitioner who has been authorized by the Attorney General of the United States to withhold the names and other identifying characteristics of certain persons pursuant to 21 U.S.C. §872(c).

Section 25. Prohibited Acts. No Person –

- (1) who is subject to the requirements of sections six and seven and twelve to seventeen, inclusive, shall dispense a controlled substance in violation of said section seventeen;
- (2) shall distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person or manufacturer a controlled substance not authorized by his registration;
- (3) who is a registrant shall distribute a controlled substance in violation of section sixteen;
- (4) shall remove, alter, or obliterate a symbol or label required by federal law and the laws of the commonwealth;
- (5) shall refuse or fail to make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required under this chapter;
- (6) shall refuse any entry into any premises or inspection authorized by this chapter;
- (7) shall remove, break, injure, or deface a seal placed upon controlled substances pursuant to this chapter, or remove or dispose of substances so placed under seal;
- (8) shall use, to his own advantage, or reveal, other than to duly authorized officers or employees of the United States or of the commonwealth or to the courts when relevant in any judicial proceeding under this chapter, any information acquired in the course of an inspection authorized by this chapter concerning any method or process which is a trade secret.

No person who is a registrant shall manufacture a controlled substance in Schedule I or II which is not expressly authorized by his registration.

Section 26. Other prohibited acts. No person who is a registrant shall knowingly or intentionally:

- (1) distribute a controlled substance classified in Schedule I or II in the course of his legitimate business, except pursuant to an order or an order form as required by section sixteen; or

- (2) furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed pursuant to the provisions of this chapter.

Section 27. Possession, delivery, sale, etc., of Hypodermic Syringe, Needles, etc.; Prescriptions, Records, etc.; Licenses.

- Who may possess
- (a) No person, not being a physician, dentist, nurse or veterinarian registered under the laws of this commonwealth, or of the state where he resides or a registered embalmer, manufacturer of or dealer in embalming supplies, pharmacist, wholesale druggist, manufacturing pharmacist, manufacturer of or dealer in surgical supplies, student engaged in an activity necessary to a course prescribed by a school of medicine, dentistry, podiatry, veterinary medicine, nursing or embalming approved under the provisions of chapter one hundred and twelve, official of any government having possession of the articles hereinafter mentioned by reason of his official duties, nurse acting under the direction of a physician or dentist, employee of a hospital or other facility licensed by the department acting under the direction of its superintendent or officer in immediate charge, or a carrier or messenger engaged in the transportation of such articles, or a person who has received a written prescription issued under subsection (c), or a podiatrist who has received a certificate from the board of registration in podiatry stating that upon examination by said board he has been determined to be competent to use hypodermic needles or a scientific investigator registered pursuant to the provisions of section seven, or a person licensed under subsection (e), shall have in his possession a hypodermic syringe, hypodermic needle, or any instrument adapted for the administration of controlled substances by injection.
 - (b) No such syringe, needle or instrument shall be delivered or sold to, or exchanged with, any person except a pharmacist, dentist, physician, veterinarian, registered embalmer, manufacturer of or dealer in embalming supplies, scientific investigator registered pursuant to the provisions of section seven, wholesale druggist, manufacturing pharmacist, manufacturer of or dealer in surgical supplies, a student enrolled in a course for which such possession is necessary and prescribed at an approved school of medicine, dentistry, podiatry, veterinary medicine, nursing or

embalming, an official of any government agency requiring the use of such syringe, needle or instrument by reason of his official duties, a nurse upon the written order of a physician or dentist, or a person who has received a written prescription issued under subsection (c), a podiatrist certified as aforesaid, or an employee of a hospital, clinic, nursing home, rest home or detoxification facility licensed by the department, or scientific institution upon the written order of its superintendent or officer in immediate charge of a person licensed under subsection (e).

- (c) A physician may issue to a patient under his immediate charge a written prescription to purchase, from a pharmacist only, any of the instruments specified in subsection (a). Such prescription shall contain the name and address of the patient, the description of the instrument prescribed and the number of instruments prescribed. The pharmacist filling the prescription shall record upon the face of said prescription, over the signature of the pharmacist making the sale, the date of such sale. Such prescription may be renewed or refilled for one year unless the physician indicates otherwise on the prescription, and each refilling shall be noted upon the prescription. No prescription for such instruments shall be refilled after one year from date of issue. The pharmacist filling the prescription shall dispense any such instrument in a sanitary container which shall completely enclose such instrument, and shall affix to said container a label bearing (1) the name and address of the pharmacy, and if said pharmacy is in a hospital, the name and address of said hospital, (2) the name and address of the patient (3) the file number of the prescription, and (4) the name of the physician prescribing the same. The person to whom the prescription is issued shall keep such instrument in said container at all times, except when such instrument is in actual use or is in the process of being cleaned.
- (d) A record shall be kept by the person selling such syringes, needles or instruments, which shall give the date of the sale, the name and address of the purchaser and a description of the instrument. This record shall be open to inspection pursuant to a judicial warrant or to the provisions of section thirty.

Physician
may prescribe;
conditions
and
requirements

- (e) No person, except a manufacturer of or dealer in surgical supplies, a manufacturer of or dealer in embalming supplies, a pharmacist or wholesale druggist, which pharmacist or wholesale druggist is licensed under the provisions of chapter one hundred and twelve, shall sell, offer for sale, deliver, or have in possession with intent to sell hypodermic syringes, hypodermic needles or any instrument adapted for the administration of controlled substances by injection, unless licensed so to do by the department. Such license shall be valid for a period of one year. The fee for such license shall be determined annually by the commissioner of administration under the provision of section three B chapter seven. A license issued to a company or corporation which has more than one branch or department shall include any and all branches and departments or sections of said company or corporation.

No person except a person listed in subsections (b) or (c) shall obtain, receive or purchase a hypodermic syringe, needle or any instrument adapted for the administration of controlled substances by injection, unless licensed so to do by the department, or by a local board of health. A license to obtain, receive or purchase any such Instrument, which license shall be valid throughout the Commonwealth, may be obtained from the department upon payment of a fee as determined annually by the commissioner of administration under the provision of section three B of chapter seven, and a license to obtain, receive or purchase any such instrument, which license shall be valid only in a particular city or town of the commonwealth, may be obtained from the local board of health upon payment of a fee of fifty cents. Said license shall be valid for one year.

Section 28. Injunctions. Upon petition of the board of registration in pharmacy or the commissioner in the case of a pharmacy, or upon petition of the commissioner in any case, the superior court shall have jurisdiction to restrain or enjoin a violation of this chapter.

Section 29. Education and research.

- (a) The commissioner of mental health in cooperation with the commissioner of education shall carry out educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with these programs he shall:

- (1) promote better recognition of the problem of misuse and abuse of controlled substances within the regulated industry and among interested groups and organizations;
 - (2) assist the regulated industry and interested groups and organizations in contributing to the reduction of misuse and abuse of controlled substances;
 - (3) consult with interested groups and organizations to aid them in solving administrative and organizational problems;
 - (4) evaluate procedures, projects, techniques, and controls conducted or proposed as part of educational programs on misuse and abuse of controlled substances;
 - (5) disseminate the results of research on misuse and abuse of controlled substances to promote a better public understanding of what problems exist and what can be done to combat them; and
 - (6) assist the attorney general in the education and training of state and local law enforcement officials in their efforts to control misuse and abuse of controlled substances.
- (b) The commissioner of mental health shall encourage research on misuse and abuse of controlled substances. In connection with the research, and in furtherance of the enforcement of this chapter, he shall:
- (1) establish methods to assess accurately the effects of controlled substances and identify and characterize those with potential for abuse;
 - (2) make studies and undertake programs of research to:
 - (i) develop new or improved approaches, techniques, systems, equipment, and devices to strengthen the enforcement of this chapter;
 - (ii) determine patterns of misuse and abuse of controlled substances and the social effects thereof; and
 - (iii) improve methods for preventing, predicting, understanding and dealing with the misuse and abuse of controlled substances; and
 - (3) enter into contracts with public agencies, institutions of higher education and private organizations or individuals for the purpose of conducting research, demonstrations or special projects which bear directly on misuse and abuse of controlled substances.
- (c) The commissioner of mental health may enter into contracts for educational and research activities.

Section 30. Administrative Inspection Warrants; Entry and Inspection Without Warrant.

- Purpose
- (a) Administrative inspection warrants shall issue for the inspection of controlled premises in accordance with the provisions of this section. As used in this section, administrative inspection warrants are warrants for the purpose of inspecting, copying and verifying the correctness of records, reports or other documents required to be kept by a registrant on controlled premises and for the seizure of property appropriate to such inspection. For the purpose of this section controlled premises means any place or area including but not limited to any building, conveyance, warehouse, factory, or establishment, in which persons registered under the provisions of this chapter or required thereunder to keep records, are permitted to hold, manufacture, compound, process, distribute, deliver, dispense, or administer any controlled substance or in which such persons make or maintain records pertaining thereto.
- Who may issue; Procedure for obtaining
- (b) A district court or justice or superior court justice may, upon proper oath or affirmation by the commissioner or his designee except in the case of a pharmacy, by the commissioner or his designee or by the designee of the board of registration in pharmacy, or by a police officer showing probable cause, issue warrants for the purpose of conducting administrative inspections authorized by this chapter or rules hereunder, and seizures of property if appropriate to the inspections.

For the purpose of the issuance of administrative inspection warrants, probable cause exists upon a showing of a reasonable and valid public interest in the effective enforcement of this chapter or rules or regulations hereunder under a general plan sufficient to justify administrative inspection of an area, premises, buildings or conveyances in the circumstances specified in the application or such warrant.

Affidavits
and
warrants

(c) An administrative inspection warrant shall issue only upon affidavit sworn to before the court, or justice establishing the grounds for issuing the warrant. If the court or justice is satisfied that grounds for the issuance of such warrant exists or that there is probable cause to believe they exist, he shall issue such warrant identifying the area, premises, buildings or conveyances to be inspected, the purpose of the inspection, and, if appropriate, the type of property to be inspected, if any. Such warrant shall:

- (1) be directed to the commissioner or to his designee, except in the case of a pharmacy to the commissioner or to the designee of the board of registration in pharmacy, or to a police officer;
- (2) command the person to whom it is directed to inspect the area, premises, buildings or conveyances identified for the purpose specified and, if appropriate, direct the seizure of the property specified;
- (3) describe the item or types of property to be inspected or seized, if any;
- (4) direct that it be served during normal business hours.

Duties of
Serving
Officer

(d) An administrative inspection warrant issued and executed pursuant to the provisions of this section shall be returned to the issuing court, except if said warrant is issued by the superior court it shall be returned to any court named in such warrant, within ten days of the date of issuance thereof unless, upon a showing of a need for additional time, the court or justice orders otherwise. If property is seized pursuant to such warrant, a copy of the inventory shall be given to the person from whom or from whose premises the property is taken, together with a receipt for the property taken. The inventory shall be made in the presence of the person executing such warrant and of the person from whose possession or premises the property was taken, if present. A copy of the inventory shall be delivered to the person from whom or from whose premises the property was taken and to the applicant for such warrant at the time it is returned to a court.

(e) When authorized by an administrative inspection warrant issued pursuant to this section a person designated by the commissioner, except in the case of a pharmacy by the commissioner or by the board of

registration in pharmacy, upon showing such warrant to the owner, operator, or agent in charge; may enter controlled premises for the purpose of conducting an administrative inspection.

- (f) A person executing an administrative inspection warrant may:
- (1) use reasonable force and means to execute the warrant;
 - (2) inspect and copy records required by this chapter to be kept;
 - (3) inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material, containers and labeling found therein, and except as provided in subsection (h), all other things therein including records, files, papers, processes, controls, and facilities bearing on violation of this chapter; and
 - (4) inventory any stock of any controlled substance therein and obtain samples thereof.
- (g) This section shall not prevent entries and administrative inspections, including seizures of property, without a warrant:

Authority
of
Officer
serving

Warrantless
Searches

- (1) if the owner, operator, or agent in charge of the controlled premises consents;
- (2) in situations presenting imminent danger to health or safety;
- (3) in situations involving inspection of conveyances if there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant;
- (4) in any other exceptional or emergency circumstance where time or opportunity to apply for a warrant is lacking; or
- (5) in all other situations in which a warrant is not required by the laws and constitution of the commonwealth or of the United States.

- (h) An inspection authorized by this section shall not extend to financial data, sales data, other than shipment data, or pricing data unless the owner, operator, or agent in charge of the controlled premises consents in writing.⁶

Section 31. Classification of controlled substances for purposes of establishing penalties. For the purposes of establishing criminal penalties for violation of a provision of this chapter, there are established the following five classes of controlled substances:

CLASS A

- (a) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers and salts is possible within the specific chemical designation:
- | | |
|------------------------|--------------------------|
| (1) Acetylmethadol | (10) Betaprodine |
| (2) Allylprodine | (11) Clonitazene |
| (3) Alphacetylmethadol | (12) Dextromoramide |
| (4) Alphameprodine | (13) Dextrorphan |
| (5) Alphamethadol | (14) Diampromide |
| (6) Benzethidine | (15) Diethylthiambutene |
| (7) Betacetylmethadol | (16) Dimenoxadol |
| (8) Betameprodine | (17) Dimepheptanol |
| (9) Betamethadol | (18) Dimethylthiambutene |

⁶Administrative inspections of controlled premises are generally handled by the State Police Diversion Investigation Unit. It is therefore unlikely that most police officers will ever be directly involved with the execution of an administrative search warrant. An administrative inspection warrant differs from a typical search warrant in that the purpose of an administrative warrant is regulatory in nature. Therefore a search conducted under an administrative inspection warrant can only be for regulatory purposes. An administrative inspection warrant cannot support a search conducted for a criminal investigation. *Commonwealth v Frodyma*, 386 Mass. 454(1982).

- | | |
|-----------------------------|---------------------|
| (19) Dioxaphetylbutyrate | (31) Norlevorphanol |
| (20) Dipipanone | (32) Normethadone |
| (21) Ethylmethylthiambutene | (33) Norpipanone |
| (22) Etonitazene | (34) Phenadoxone |
| (23) Etoxeridine | (35) Phenampromide |
| (24) Furethidine | (36) Phenomorphan |
| (25) Hydroxypethidine | (37) Phenoperidine |
| (26) Ketobemidone | (38) Piritramide |
| (27) Levomoramide | (39) Proheptazine |
| (28) Levophenacymorphan | (40) Properidine |
| (29) Morpheridine | (41) Racemoramide |
| (30) Noracymethadol | (42) Trimeperidine |

(b) Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salts of isomers whenever the existence of such salts, isomers and salts of isomers is possible within the specific chemical designation:

- | | |
|---------------------------|-------------------------------|
| (1) Acetorphine | (12) Methyldesorphine |
| (2) Acetyldihydrocodeine | (13) Methylhydromorphone |
| (3) Benzylmorphine | (14) Morphine methylbromide |
| (4) Codeine Methylbromide | (15) Morphine methylsulfonate |
| (5) Codeine-N-Oxide | (16) Morphine-N-Oxide |
| (6) Cyrenorphine | (17) Myrophine |
| (7) Desomorphine | (18) Nicocodeine |
| (8) Dihydromorphine | (19) Nicomorphine |
| (9) Etorphine | (20) Normorphine |
| (10) Heroin | (21) Pholcodine |
| (11) Hydromorphenol | (22) Thebacon |

CLASS B

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

- (1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate
- (2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph (1) except that these substances shall not include the isequinoline alkaloids of opium.
- (3) Opium poppy and poppy straw

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers and salts is possible within the specific chemical designation:

- (1) Alphaprodine
- (2) Anileridine
- (3) Bezitramide
- (4) Dihydrocodeine
- (5) Diphenoxylate
- (6) Fentanyl
- (7) Isomethadone
- (8) Levomethorphan
- (9) Levorphanol
- (10) Metazocine
- (11) Methadone
- (12) Methadone-Intermediate, 4-cyano-2- dimethylamino-4, 4-diphenyl butane
- (13) Moramide-Intermediate, 2-methyl-3- morpholine-1, 1-diphenylpropane carboxylic acid
- (14) Pethidine
- (15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4- phenylpiperidine
- (16) Pethidine-Intermeidate-B, ethyl-4-phenyl- piperidine-4-carboxylate
- (17) Pethidine-Intermediate-C, 1-methyl-4- phenylpiperidine-4-carboxylic acid
- (18) Phenazocine
- (19) Piminodine
- (20) Racemethorphan
- (21) Racemorphan

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

- (1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.
 - (2) Any substance which contains any quality of methamphetamine, including its salts, isomers and salts of isomers.
 - (3) Phenmetrazine and its salts.
 - (4) Methylphenidate.
- (d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:
- (1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.
 - (2) Any substance which contains any quantity of methaqualone, or any salt or derivative of methaqualone.
- (e) Unless specifically excepted or listed in another schedule, any material, compound, mixture or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomer and salts of isomers is possible within the specific chemical designation:
- (1) Lysergic acid
 - (2) Lysergic acid amide
 - (3) Lysergic acid diethylamide
 - (4) phencyclidine

CLASS C

- (a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:
- | | |
|----------------------|---------------------------|
| (1) Chlordiazepoxide | (9) Methyprylon |
| (2) Chlorhexadol | (10) Oxazepam |
| (3) Clorazepam | (11) Prazepam |
| (4) Clorazepate | (12) Sulfondiethylmethane |
| (5) Diazepam | (13) Sulfonethylmethane |
| (6) Flurazepam | (14) Sulfonmethane |
| (7) Glutethimide | (15) Temazepam |
| (8) Lorazepam | |

(b) Nalorphine

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation containing limited quantities of any of the following narcotic drugs or any salts thereof:

- (1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit with an equal or greater quantity of an isoquinoline alkaloid of opium.
- (2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts.
- (3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.
- (4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active non-narcotic ingredients in recognized therapeutic amounts.
- (5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts.
- (6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit with one or more active nonnarcotic ingredients in recognized therapeutic amounts.
- (7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
- (8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active non-narcotic ingredients in recognized therapeutic amounts.

(d) Blank

(e) Unless specifically excepted or listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

- (1) 3,4-methylenedioxy amphetamine
- (2) 5-methoxy-3,4-methylenedioxy amphetamine
- (3) 3,4,5-trimethoxy amphetamine
- (4) Bufotenine
- (5) Diethyltryptamine
- (6) Dimethyltryptamine
- (7) 4-methyl-2,5,-dimethazyamphetamine
- (8) Ibogaine
- (9) Mescaline
- (10) Peyote
- (11) N-ethyl-3-piperidyl benzilate
- (12) N-methyl-3-piperidyl benzilate
- (13) Psilocybin
- (14) Psilocyn
- (15) Tetrahydrocannabinols
- (16) 4-Bromo-2,5-dimethoxy-amphetamine

CLASS D

(a)

- | | |
|---------------------|-------------------------|
| (1) Barbital | (7) Meprobamate |
| (2) Chloral betaine | (8) Methylphenobarbital |
| (3) Chloral hydrate | (9) Paraldehyde |
| (4) Ethchlorvynol | (10) Petrichloral |
| (5) Ethinamate | (11) Phenobarbital |
| (6) Methohexital | |

(b) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

- (1) Marihuana
- (2) Butyl Nitrite
- (3) Isobutyl Nitrite
- (4) 1-Nitrosoxy-Methyl-Propane.

CLASS E

- (a) Any compound, mixture or preparation containing any of the following limited quantities of narcotic drugs, which shall include one or more non-narcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:
- (1) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams
 - (2) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams
 - (3) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams
 - (4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit
 - (5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.
- (b) Prescription drugs other than those included in Classes A, B, C, D, and subsection (a) of this Class.

Section 32. Unauthorized manufacture, distribution, etc., of Class A substances; penalties.

- First
Offense (a) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a controlled substance in Class A of section thirty-one shall be punished by imprisonment in the state prison for not more than ten years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than \$1,000 and not more than \$10,000 or both such fine and imprisonment.

- (b) Subsequent Offenses Any person convicted of violating this section after one or more prior convictions of manufacturing, distributing, dispensing or possessing with the intent to manufacture, distribute, or dispense a controlled substance as defined by section thirty-one of this chapter under this or any prior law of this jurisdiction or of any offense of any other jurisdiction, federal, state or territorial, which is the same as or necessarily includes the elements of said offense shall be punished by a term of imprisonment in the state prison for not less than five nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of five years and a fine of not less than two thousand dollars may be imposed but not in lieu of the mandatory minimum five year term of imprisonment, as established herein.

Section 32A. Unauthorized manufacture, distribution, etc., of Class B substances; penalties.

- (a) First Offense Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to distribute or dispense a controlled substance in Class B of section thirty-one shall be imprisoned in the state prison for not more than ten years, or in a jail or house of correction for not more than two and one-half years, or by a fine of not less than one thousand nor more than ten thousand dollars, or both such fine and imprisonment.

- (b) Subsequent Offenses Any person convicted of violating this section after one or more prior convictions of manufacturing, distributing, dispensing or possessing with the intent to manufacture, distribute or dispense a controlled substance as defined by section thirty one-of this chapter under this or any prior law of this jurisdiction or of any offense of any other jurisdiction, federal, state or territorial, which is the same as or necessarily includes the elements of said offense shall be punished by a term of imprisonment in the state prison for not less than three years nor more than ten years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of three years and a fine of not less than two thousand and five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

- (c) Any person who knowingly or intentionally manufactures, distributes, dispenses or possesses with intent to manufacture, distribute or dispense phencyclidine shall be punished by a term of imprisonment in the state prison for not less than two and one-half nor more than ten years or by imprisonment in a jail or house of correction for not less than one nor more than two and one-half years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of one year and a fine of not less than one thousand dollars nor more than ten thousand dollars may be imposed but not in lieu of the mandatory minimum one year term of imprisonment, as established herein.

Section 32B. Unauthorized manufacture, distribution, etc., Class C substances; penalties.

- First
Offense
- (a) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute, or dispense a controlled substance in Class C of section thirty-one, shall be imprisoned for not more than five years or in jail or house of correction for not more than two and one half years or by a fine of not less than five hundred dollars nor more than five thousand dollars, or both such fine and imprisonment.
- Subsequent
Offenses
- (b) Any person convicted of violating this section after one or more prior convictions of manufacturing, distributing, dispensing, or possessing with the intent to manufacture, distribute or dispense a controlled substance as defined by section thirty-one under this or any prior law of this jurisdiction, federal, state or territorial, which is the same as or necessarily includes the elements of said offense shall be punished by a term of imprisonment in the state prison for not less than two and one half nor more than ten years, or by imprisonment in a jail or house of correction for not less than two nor more than two and one half years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of two years and a fine of not less than one thousand nor more than ten thousand dollars may be imposed, but not in lieu of the mandatory minimum term of imprisonment, as established herein.

Section 32C. Unauthorized manufacture, distribution, etc, Class D substances; penalties.

First Offense (a) Any person who knowingly or intentionally manufactures, distributes, dispenses, or cultivates, or possesses with intent to manufacture, distribute, dispense or cultivate a controlled substance in Class D of section thirty-one shall be imprisoned in jail or house of correction, for not more than two years or by a fine of not less than five hundred and not more than five thousand dollars or by both such fine and imprisonment.

Subsequent Offenses (b) A person convicted of violating this section after one or more prior convictions of manufacturing, distributing, dispensing, cultivating or possessing with intent to manufacture, distribute, dispense or cultivate a controlled substance as defined by section thirty-one under this or any prior law of this jurisdiction, federal state or territorial, which is the same as or necessarily includes the elements of said offense shall be punished by a term of imprisonment in a jail or house of correction for not less than one nor more than two and one-half years or by a fine of not less than one thousand nor more than ten thousand dollars, or by both such fine and imprisonment.

Section 32D. Unauthorized manufacture, distribution, etc., of Class E substances; penalties.

First Offense (a) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a controlled substance in Class E of section thirty-one shall be imprisoned in a jail or house of correction for not more than nine months or by a fine or not less \$250 and not more than \$2,500, or both such fine and imprisonment.

Subsequent Offenses (b) Any person convicted of violating this section after one or more prior convictions of this offense or of any offense of any other jurisdiction, federal, state, or territorial, which is the same as or necessarily includes the elements of said section, shall be punished by a term of imprisonment in jail or the house of correction for not more than one and one-half years or by a fine of not less than \$500 nor more than \$5,000, or by both such fine and imprisonment.

Section 32E. Unauthorized Trafficking in marihuana, cocaine, heroin, etc.; penalties.

- (a) Any person who trafficks in marihuana by knowingly or intentionally manufacturing, distributing, or cultivating or possessing with intent to manufacture, distribute, dispense, or cultivate, or by bringing into the commonwealth a net weight of fifty pounds or more of marihuana or a net weight of fifty pounds or more of any mixture containing marihuana shall, if the net weight of marihuana or any mixture thereof is:
- (1) Fifty pounds or more, but less than one hundred pounds, be punished by a term of imprisonment in the state prison for not less than two and one-half nor more than fifteen years or by imprisonment in a jail or house of correction for not less than one nor more than two and one-half years. No sentence imposed under the provision of this section shall be for less than a mandatory minimum term of imprisonment of one year and a fine of not less than five hundred nor more than ten thousand dollars may be imposed but not in lieu of the mandatory minimum one year term of imprisonment, as established herein.
 - (2) One hundred pounds or more, but less than two thousand pounds, be punished by a term of imprisonment in the state prison for not less than three nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of three years and a fine of not less than two thousand and five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.
 - (3) Two thousand pounds or more, but less than ten thousand pounds, be punished by a term of imprisonment in the state prison for not less than five nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of five years and a fine of not less than five thousand nor more than fifty thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

Marihuana;
severity of penalty
scaled to quantity

(4) Ten thousand pounds or more, be punished by a term of imprisonment in the state prison for not less than ten nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of ten years and a fine of not less than twenty thousand nor more than two hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(b) Any person who trafficks in cocaine or any salt thereof by knowingly or intentionally manufacturing, distributing, or dispensing or possessing with intent to manufacture, distribute, or dispense or by bringing into the commonwealth a net weight of twenty-eight grams or more of cocaine or any salt thereof or a net weight of twenty-eight grams or more of any mixture containing cocaine or any salt thereof shall, if the net weight of cocaine or any salt thereof or any mixture thereof is:

(1) Twenty-eight grams or more, but less than one hundred grams, be punished by a term of imprisonment in the state prison for not less than three nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of three years and a fine of not less than two thousand and five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(2) One hundred grams or more, but less than two hundred grams, be punished by a term of imprisonment in the state prison for not less than five nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of five years and a fine of not less than five thousand nor more than fifty thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(3) Two hundred grams or more, be punished by a term of imprisonment in the state prison for not less than ten nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of ten years and

Cocaine; severity
of penalty scaled
to quantities

a fine of not less than twenty thousand nor more than two hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein. 7/

Heroin,
morphine;
opium

(c) Any person who trafficks in heroin or any salt thereof, morphine or any salt thereof, opium or any derivative thereof by knowingly or intentionally manufacturing, distributing or dispensing or possessing with intent to manufacture, distribute, or dispense or by bringing into the commonwealth a net weight of twenty-eight grams or more of heroin or any salt thereof, morphine or any salt thereof, opium or any derivative thereof shall, if the net weight of heroin or any salt thereof, morphine or any salt thereof, opium or any derivative thereof or any mixture thereof is:

(1) Twenty-eight grams or more, but less than one hundred grams, be punished by a term of imprisonment in the state prison for not less than five nor more than twenty years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of five years and a fine of not less than five thousand nor more than fifty thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

Severity of
penalty scaled
to quantity

(2) One hundred grams or more, but less than two hundred grams, be punished by a term of imprisonment in the state prison for not less than ten nor more than twenty years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of ten years and a fine of not less than ten thousand nor more than one hundred thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(3) Two hundred grams or more, be punished by a term of imprisonment in the state prison for not less than fifteen nor more than twenty years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of fifteen years and a fine of not less than fifty thousand nor more than five hundred thousand may be imposed

7/ The Appeals Court has held that this section of the statute (32E(b)) is not unconstitutionally vague. Further, its penalty provisions do not constitute cruel and unusual punishment. Commonwealth v. Silva 21 Mas. App (CT. 536 (1986).

but not in lieu of the mandatory minimum term of imprisonment, as established herein. 8/

Section 32F. Unauthorized manufacture, distribution of Class A substances to minors; penalties.

(a) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute, or dispense a controlled substance in Class A of section thirty-one to a person under the age of eighteen years shall be punished by a term of imprisonment in the state prison for not less than five nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of five years and a fine of not less than one thousand nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

Distribution
to minors of
substances in
Classes A, B, C

(b) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute, or dispense a controlled substance in Class B of section thirty-one to a person under the age of eighteen years shall be punished by a term of imprisonment in the state prison for not less than three nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of three years and a fine of not less than one thousand nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(c) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute, or dispense a controlled substance in Class C of section thirty-one to a person under the age of eighteen years shall be punished by a term of imprisonment in the state prison for not less than two and one-half nor more

8/As applied to the defendants, there was no unconstitutional ambiguity in the word "mixture" in this section defining offense of trafficking in heroin. Commonwealth v Rosa, 17 Mass App 495 (1984) on rehearing, 18 Mass App 247 (1984).

Penalty provision of this section proscribing trafficking in heroin did not violate due process. Comm. v Rosa Supra

Even if there was a variance between indictment and proof, where indictment referred to heroin, but proof referred to a mixture containing heroin, where essential elements of the crime were correctly stated, reversal was not required absent evidence that defendants were prejudiced in their defense. Commonwealth v Beverly, 389 Mass 866, (1983).

than fifteen years or in a jail or house of correction for not less than two and one-half nor more than two and one-half years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of two years and a fine of not less than one thousand nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum two year term of imprisonment, as established herein.

Section 32G. Unauthorized manufacture, distribution, etc. of counterfeit substances; penalties.

Any person who knowingly or intentionally creates, distributes, dispenses or possesses with intent to distribute or dispense a counterfeit substance, shall be punished by imprisonment in a jail or house of correction for not more than one year or by a fine of not less than \$250 nor more than \$2,500, or both such fine and imprisonment.

Section 32H. Mandatory terms of imprisonment; Eligibility for Parole, etc.

A prosecution commenced under paragraph (b) of section thirty-two, paragraphs (b) and (c) of section thirty-two A, paragraph (b) of section thirty-two B, sections thirty-two E and thirty-two F shall not be placed on file or continued without a finding, and the sentence imposed upon a person convicted of violating any provision of said sections shall not be reduced to less than the mandatory minimum term of imprisonment as established in said section, nor shall any sentence of imprisonment imposed upon any person be suspended or reduced until such person shall have served said mandatory minimum term of imprisonment.

A person convicted of violating any provisions of said sections shall not, until he shall have served the mandatory minimum term of imprisonment established, in said sections, be eligible for probation, parole, furlough, or work release; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of the correctional institution, grant to said offender a temporary release in the custody of an officer of such institution, for the following purposes: to attend the funeral of a relative, to visit a critically ill relative, or to obtain emergency medical or psychiatric services unavailable at said institution. The provisions of section thirty-one of chapter two hundred and seventy-nine shall not apply to any person convicted of violating any provisions of said sections. The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person, seventeen years of age or over, charged with a violation of said sections, or to any child between age fourteen and seventeen, so charged, if the court is of the opinion that the interests of the public require that he shall be tried for such offense instead of being dealt with as a child.

Section 32I. Sale of Drug Paraphernalia; Penalty.

- (a) No person shall sell, possess with intent to sell, or manufacture with intent to sell drug paraphernalia, knowing,

or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. Whoever violates any provision of this paragraph shall be punished by imprisonment in jail or house of correction for not less than one nor more than two years, or by a fine of not less than five hundred nor more than five thousand dollars, or both.

- (b) Any person who violates the foregoing provision by selling drug paraphernalia to a person under eighteen years of age shall be imprisoned in the state prison for not less than three nor more than five years, or by a fine not less than one thousand nor more than five thousand dollars, or both. 9/
- Sale to minors

Section 33. Use of fictitious, revoked, etc., registration number, uttering false prescription, and acquisition of controlled substance by fraud, forgery, non-disclosure, etc., prohibited; penalties.

- (a) No person shall knowingly or intentionally use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended or issued to another person.
- False registration numbers

- (b) No person shall utter a false prescription for a controlled substance, nor knowingly or intentionally acquire or obtain possession of a controlled substance by means of forgery, fraud, deception or subterfuge, including but not limited to the forgery or falsification of a prescription or the non-disclosure of a material fact in order to obtain a controlled substance from a practitioner.
- False prescriptions

- (c) Whoever violates any provision of this section shall be punished by imprisonment in the state prison for not more than four years or in a house of correction for not more than two and one half years or by a fine of not more than twenty thousand dollars, or by both such fine and imprisonment. Whoever violates any provision of this section after one or more prior convictions of a violation of this section, or of a felony under any other provision of this chapter, or under a provision of prior law relative to the sale or manufacture of a
- Penalties

9/The Supreme Judicial Court recently held that this statute is not void for vagueness. Commonwealth v. Jasmin, 396 Mass. 653 (1986).

narcotic drug or a harmful drug as defined in said earlier law shall be punished by imprisonment in the state prison for not more than eight years or in a jail or house of correction for not more than two and one half years, or by a fine of not more than thirty thousand dollars or by both such fine and imprisonment.

Section 34. Unauthorized possession; penalties; dismissal and sealing of record in certain cases of first offense

No person knowingly or intentionally shall possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the provisions of this chapter. Except as hereinafter provided, any person who violates this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars or by both such fine and imprisonment. Any person who violates this section by possessing heroin shall for the first offense be punished by imprisonment in a house of correction for not more than two years or by a fine of not more than two thousand dollars, or both, and for a second or subsequent offense shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years or by a fine of not more than five thousand dollars and imprisonment in a jail or house of correction for not more than two and one-half years. Any person who violates this section by possession of marijuana or a controlled substance in Class E of section thirty-one shall be punished by imprisonment in a house of correction for not more than six months or a fine of five hundred dollars, or both. Except for an offense involving a controlled substance in Class E of section thirty-one, whoever violates the provisions of this section after one or more convictions of a violation of this section or of a felony under any other provisions of this chapter, or of a corresponding provision of earlier law relating to the sale or manufacture of a narcotic drug as defined in said earlier law, shall be punished by imprisonment in a house of correction for not more than two years or by a fine of not more than two thousand dollars, or both.

If any person who is charged with a violation of this section has not previously been convicted of a violation of any provision of this chapter or other provision of prior law relative to narcotic drugs or harmful drugs as defined in said prior law, or of a felony under the laws of any state or of the United States relating to such drugs has had his case continued without a finding to a certain date, or has been convicted and placed on probation, and if, during the period of said continuance or of said probation, such person does not violate any of the conditions of said continuance or said probation, then upon the expiration of such period the court may dismiss the proceedings against him, and may order sealed all official records relating to his arrest, indictment, conviction, probation, continuance or discharge pursuant to this section; provided, however, that departmental records which are not public records, maintained by police and other law

Possession
offenses;
penalties

Sealing
of
records
in certain
circum-
stances;
first
offenders
only

Non-
disclosure
of
sealed
record
not
basis
for
perjury
charge

enforcement agencies, shall not be sealed; and provided further, that such a record shall be maintained in a separate file by the department of probation solely for the purpose of use by the courts in determining whether or not in subsequent proceedings such person qualifies under this section. The record maintained by the department of probation shall contain only identifying information concerning the person and a statement that he has had his record sealed pursuant to the provisions of this section. Any conviction, the record of which has been sealed under this section, shall not be deemed a conviction for purposes of any disqualification or for any other purpose. No person as to whom such sealing has been ordered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, indictment, conviction, dismissal, continuance, sealing, or any other related proceeding, in response to any inquiry made of him for any purpose.

Notwithstanding any other penalty provision of this section, any person who is convicted for the first time under this section for the possession of marihuana or a controlled substance in Class E and who has not previously been convicted of any offense pursuant to the provisions of this chapter, or any provision of prior law relating to narcotic drugs or harmful drugs as defined in said prior law shall be placed on probation unless such person does not consent thereto, or unless the court files a written memorandum stating the reasons for not so doing. Upon successful completion of said probation, the case shall be dismissed and records shall be sealed. 10/

10/ Offense of being present where heroin is illegally kept is not a lesser included offense of possession of controlled substance. Possession requires proof of dominion or control and being present where heroin is kept does not require such proof. While dominion and control may be inferred from presence, presence is not required to prove possession. Presence is the significant element of the offense of being present where heroin is kept.

Being a passenger in rear seat of a car does not, without more, imply possession of the car's contents, including any contraband therein. Where an individual possesses the identical mass of a single drug at one time and one place, do not charge him with both possession of the drug and being present where the drug is kept. Caveat: One may be charged with both offenses if there is another person who had ownership, possession and control who can be charged as a joint venturer on the possession offense.

Possession implies control and power, exclusive or joint. Constructive possession implies knowledge coupled with the ability and intention to exercise dominion and control.

Section 35. Presence where heroin is kept or in company of person in possession of heroin prohibited; penalties.

Any person who is knowingly present at a place where heroin is kept or deposited in violation of the provisions of this chapter, or any person who is in the company of a person, knowing that said person is in possession of heroin in violation of the provisions of this chapter, shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars, or both; provided, however, that the provisions of the third paragraph of section thirty-four relative to probation sealing of the records and repeated violations shall apply to him. 11/

Section 36. Protective Custody of child found where controlled substances kept.

Notwithstanding the provisions of section thirty-five, if a police officer finds a child present where said officer finds a substance which he reasonably believes to be a controlled substance listed in Class A, B, or C of section thirty-one kept or possessed in violation of any provision of this chapter, and if the police officer reasonably believes that the child has not reached his seventeenth birthday and that the child knew of the presence of such controlled substance, the police officer may lawfully take such child into protective custody for a period not to exceed four hours. Persons having custody of a child under this section shall make reasonable efforts to notify the child's parent or guardian or other person having lawful custody. Such persons shall be considered to be acting in the conduct of their official duties and shall not be held criminally or civilly liable for such acts. A child detained pursuant to the provisions of this section shall not be considered to have been arrested or to have a criminal record for any purpose; however, only a departmental record of custody shall be made by the officer indicating the circumstances of custody. The procedures and processes provided by this section for the care, protection, and custody of children are not exclusive but are in addition to all others provided by law.

Section 37. Stealing controlled substances; penalties.

Whoever steals a controlled substance from a registered manufacturer, wholesale druggist, pharmacy or other person authorized to dispense or possess any controlled substance shall be punished by imprisonment in the state prison for not more than ten years or in a jail or house of correction for not more than two and one half years or by a fine of not more than five hundred dollars.

11/ This offense is not a lesser included offense of possession of Class A. Commonwealth v Rodriguez, 11 Mass. App. ct 379 (1981). Therefore, a defendant may not be charged with both possession and being present as a result of the same incident. Kuklis v Commonwealth, 361 Mass. 302 (1972).

Section 38. Violation of subsection (a) of section 24 or sections 25, 26, 27; penalties.

Any person who knowingly violates any provision of subsection (a) of section twenty-four, or of sections twenty-five, twenty-six, or twenty-seven shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars, or both. Whoever violates any of the provisions of any of said sections after one or more prior convictions of a violation of any provision of this chapter or of a provision of prior law relating to the sale or manufacture of narcotic drugs or harmful drugs as defined in said prior law shall be punished by imprisonment for not more than two years or by a fine of not more than two-thousand dollars, or both.

Section 39. Violation of sections 21 or 22; penalties.

Any person who knowingly violates any provision of sections twenty-one or twenty-two shall be punished by imprisonment for not more than six months or by a fine of not more than fifteen hundred dollars, or by both. Whoever violates any of the provisions of said sections after one or more prior convictions of a violation of any provision of this chapter, or of a provision of prior law relating to narcotic drugs or harmful drugs as defined in said prior law shall be punished by imprisonment for not more than two years or by a fine of not more than two thousand dollars, or both.

Section 40. Conspiracy to violate chapter; penalties.

Whoever conspires with another person to violate any provision of this chapter shall be punished by imprisonment or fine, or both, which punishment shall not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the conspiracy. 12/

12/ Before a police officer charges a defendant with conspiracy he should remember that a prosecutor in Massachusetts generally can not try the conspiracy charge with the substantive offense. Thus if two individuals are each charged with possession of a Class A substance with intent to distribute and also conspiracy (with each other) to commit this crime, the prosecutor must try the two individuals for either the possession charge or the conspiracy charge. It is therefore not advisable as a general rule to charge a defendant with both the substantive offense and the conspiracy.

The main element of a conspiracy charge is the agreement (between two or more persons) to commit the illegal act. Mere presence with another person actually committing the illegal act is not sufficient to prove conspiracy. *Commonwealth v Deagle*, 10 Mass. App.Ct 563 (1980). Evidence of telephone conversation, correspondence, and telephone billing records are relevant to show relationships between conspirators. *Commonwealth v Williams*, 8 Mass. App. 283 (1979); *Commonwealth v Cohen*, 6 Mass. App 563 (1978).

Section 41. Arrest without warrant. A police officer shall have the authority to arrest without a warrant:

- (a) any person committing in his presence any offense set forth in this chapter;
- (b) any person who he has probable cause to believe has committed or is committing a felony set forth under the provisions of this chapter; or
- (c) any person who he has probable cause to believe has committed or is committing a violation of the provisions of sections twenty-seven, thirty-two, thirty-two A, thirty-two B, thirty-two C, thirty-two D, thirty-two E, thirty-two F, thirty-three, thirty-four, thirty-five, thirty-seven and forty.

Section 42. Cooperative arrangements.

The commissioner and the attorney general shall cooperate with federal and other state agencies in discharging their responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end they may:

- (1) Arrange for the exchange of information among governmental officials concerning the use and abuse of controlled substances;
- (2) Coordinate and cooperate in training programs concerning the enforcement of laws governing controlled substances at local and state levels;
- (3) Cooperate with the bureau by establishing a centralized unit to accept, catalog, file and collect statistics including statistics regarding drug dependent persons and controlled substance law offenders within the commonwealth and make the information available for federal, state and local law enforcement purposes, provided that they shall not furnish the name or identity of a patient or research subject; and
- (4) Conduct programs of eradication aimed at destroying wild or illicit growth of plant species from which controlled substances may be extracted.

Section 43. Conformity with Federal Law.

Notwithstanding any other provisions of this chapter, no practitioner shall dispense, distribute, administer, or possess any controlled substance except in conformity with the provisions of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970 or any amendment thereof and the Federal Food, Drug and Cosmetic Act.

Section 44. Sealing of record upon dismissal, finding of not guilty, etc.; Effect of Sealing.

If any person is found not guilty of the violation of any provision of section thirty-four or if a complaint against him is dismissed or an indictment nol prossed for a violation of said section, the court shall order all official records relating to his arrest, indictment, conviction, continuance or discharge to be sealed; provided, however, that departmental records maintained by police and other law enforcement agencies which are not public records shall not be sealed.

No person as to whom such sealing has been ordered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise making a false statement by reason of his failure to recite or acknowledge such arrest, indictment, disposition, sealing or any other related court proceeding, in response to any inquiry made of him for any purpose.

Section 45. Effect of Felony Charge.

Any person arrested for or charged with the criminal violation of any provision of this chapter which constitutes a felony may at the time of arrest or as soon thereafter as is practicable be photographed and fingerprinted according to the system of the state bureau of identification, and upon conviction any such fingerprints and photographs shall be made a part of permanent records of the police department of the municipality where the arrest took place, and without delay two copies of the fingerprints and photographs shall be forwarded, with such other description as may be required and a written history of the offense, to the state bureau of identification.

Section 46. Repealed by St.1978, c. 508, § 1. St.1978, c. 508, § 1, repealing this section, was approved July 19, 1978. The repealed section was derived from c. 94, former § 216.

Section 47. Forfeitures.

- (a) The following property shall be subject to forfeiture to the commonwealth and all property rights therein shall be in the commonwealth:
 - (1) All controlled substances which have been manufactured, delivered, distributed, dispensed or acquired in violation of this chapter.
 - (2) All materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, dispensing, distributing, importing, or exporting any controlled substance in violation of this chapter.

Property
subject to
forfeiture

- (3) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, conceal, or otherwise to facilitate the manufacture, dispensing, or distribution of, or possession with intent to manufacture, dispense, or distribute, a controlled substance in violation of the provisions of section thirty-two, thirty-two A, thirty-two B, thirty-two C, thirty-two D, thirty-two E, thirty-two F, thirty-two G or any part thereof.
- (4) All books, records, and research, including formulas, microfilm, tapes and data which are used, or intended for use, in violation of this chapter.
- (5) All moneys used, or intended for use, in the procurement, manufacture, compounding, processing, delivery, or distribution of any controlled substance in violation of this chapter; all moneys which are the proceeds of any sale of any controlled substance in violation of this chapter.
- (6) All drug paraphernalia.
- (6A) Real estate which has been proven to have been in the possession or ownership of the person and used in the furtherance of illegal drug activity by such person; provided, however, that such real estate is not the principal domicile inhabited by the immediate family of any person convicted under this chapter.
- (7) No forfeiture under this section shall extinguish a security interest held by a creditor in a conveyance.

(b) Property subject to forfeiture under sub-paragraphs (1), (2), (4), (5) and (6) of subsection (a) shall be declared forfeit by any court having jurisdiction over said property or having final jurisdiction over any related criminal proceeding brought under any provision of this chapter. Property subject to forfeiture under subparagraph (1) of subsection (a) of this section shall be destroyed, regardless of the final disposition of such related criminal proceeding, if any, unless the court for good cause shown orders otherwise.

(c) The court shall order forfeiture of all conveyances subject to the provisions of subparagraph (3) of subsection (a) of this section, except as follows:

Some
forfeited
property
to be
destroyed

- (1) No conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this chapter.
- (2) No conveyance shall be forfeited by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of the commonwealth, or of any state.
- (3) No conveyance shall be subject to forfeiture unless the owner thereof knew or should have known that such conveyance was used in and for the business of unlawfully manufacturing, dispensing, or distributing controlled substances. Proof that the conveyance was used to facilitate the unlawful dispensing, manufacturing, or distribution of, or possession with intent unlawfully to manufacture, dispense or distribute, controlled substances on three or more different dates shall be prima facie evidence that the conveyance was used in and for the business of unlawfully manufacturing, dispensing, or distributing controlled substances.
- (4) No conveyance used to facilitate the unlawful manufacturing, dispensing, or distribution of, or the possession with intent unlawfully to manufacture, dispense, or distribute marihuana or a substance, not itself a controlled substance, containing any marihuana shall be forfeited if the net weight of the substance so manufactured, dispensed, or distributed or possessed with intent to manufacture, dispense or distribute, is less than ten pounds in the aggregate.
- (d) A district attorney or the attorney general may petition the superior court in the name of the commonwealth in the nature of a proceeding in rem to order forfeiture of a conveyance or moneys subject to forfeiture under the provisions of subparagraphs (3) and (5) of subsection (a). Such petition shall be filed in the court having jurisdiction over said conveyance or said moneys or having final jurisdiction over any related criminal proceeding brought under any provision of this chapter. Such proceeding shall be deemed a civil suit in equity, in which the commonwealth shall have the burden of proving all material facts by a preponderance of the evidence, and the owner of said conveyance or other person claiming thereunder shall have the burden as to all

Property exempt
from forfeiture

Civil
forfeiture
petitions
by District
Attorney
or
Attorney
General

exceptions set forth in subsection (c). The court shall order the commonwealth to give notice by certified or registered mail to the owner of said conveyance or said moneys and to such other person as appears to have an interest therein, and shall promptly, but not less than two weeks after notice, hold a hearing on the petition. At such hearing the court shall hear evidence and make findings of fact and enter conclusions of law, and shall thereupon issue a final order, from which the parties shall have such right of appeal as from a decree in equity. Such final order shall provide for disposition of said conveyance or said moneys by the commonwealth or any subdivision thereof in any manner not prohibited by law, including official use by an authorized law enforcement or other public agency, or sale at public auction or by competitive bidding. Said proceeds once acquired shall be distributed equally between the prosecuting district attorney or attorney general and the city, town, state or metropolitan district police department. If more than one department is substantially involved in the seizure, the court having jurisdiction over the forfeiture proceedings, shall equitably distribute the fifty percent among those departments. All such funds shall be deposited in a special law enforcement trust fund and shall be expended to defray the costs of protracted investigations, to provide additional technical equipment or expertise, to provide matching funds to obtain federal grants or for such other law enforcement purposes as the chief of police of such city or town, the commissioner of public safety, or the superintendent of the metropolitan district police deems appropriate, but such funds shall not be considered a source of revenue to meet the operating needs of such department. The reasonable expenses of the forfeiture proceedings and the balance thereof shall be deposited in said law enforcement trust fund.

Records to be maintained of property to forfeiture; disposition of forfeited property

- (e) Any officer, department, or agency having custody of any property subject to forfeiture under this chapter or having disposed of said property shall keep and maintain full and complete records showing from whom it received said property, under what authority it held or received or disposed of said property, to whom it delivered said property, the date and manner of destruction or disposition of said property, and the exact kinds, quantities and forms of said property. Said records, shall be open to inspection by all federal and state officers charged with enforcement of federal and state drug control laws. Persons making final disposition or destruction of said property under court order shall report, under oath, to the court the exact circumstances of said disposition or destruction.
- (f) During the pendency of the proceedings the court may issue at the request of the commonwealth ex parte any preliminary order or process as is necessary to seize or secure the property for which forfeiture is sought and to provide for its custody. Process for seizure of said property shall issue

only upon a showing of probable cause, and the application therefor and the issuance, execution, and return thereof shall be subject to the provisions of chapter two hundred and seventy-six, so far as applicable.

Summary seizure of certain plants by police officers

- (g) Species of plants from which controlled substances in Schedules I and II may be derived which have been planted or cultivated in violation of this chapter, or of which the owners or cultivators are unknown, or which are wild growths may be seized by any police officer and summarily forfeited to the commonwealth.
- (h) The failure, upon demand by a police officer of the person in occupancy or in control of land or premises upon which the species of plants are growing to produce an appropriate registration, or proof that he is a holder thereof, constitutes authority for the seizure and forfeiture of the plants. 13/

Section 47A. Custodian of seized drugs and controlled substances; chemical analyses; destruction or disposal of controlled substances after disposition of case.

The police commissioner, chief superintendent or other officer or board at the head of each police

13/ There is no requirement that the drug be physically stashed in the vehicle rather than carried by an occupant (even an occupant outside of the car) so long as the objective is distribution.

Mere personal possession of a controlled substance by one traveling in a vehicle does not constitute sufficient grounds for forfeiture of the vehicle.

Do not attempt to confiscate under this section any vehicle which is owned in part by a bank or finance company. There are no provisions under the law by which the District Attorney or police can pay off the balance owed a bank or finance company.

Proceedings to forfeit a vehicle as a conveyance involved in drug trafficking must be begun within a reasonable time after seizure (7-14 days).

A jury trial is required if requested in forfeiture cases. The Commonwealth must prove by a preponderance of the evidence (51%) that the claimant/owner of the vehicle "knew or should have known" that the vehicle was used for distribution of controlled substances.

The search and seizure provisions of the 4th Amendment and the exclusionary rule are applicable in civil forfeiture proceedings exactly as though the proceedings were criminal.

Police officer to be designated "evidence officer"

department in the commonwealth shall appoint a police officer to act as custodian of all controlled substances and narcotic drugs seized in the course of any arrest or investigation. Such custodian shall be designated as the "evidence officer".

Notwithstanding the provisions of any general or special law or rule or regulation to the contrary, controlled substances or narcotic drugs seized in cases under the provisions of this chapter where the violation is a misdemeanor and requiring chemical analyses which are to be performed at a laboratory operated by the department of public health or the department of public safety or the University of Massachusetts medical center may be mailed to or from the place of such analyses by using the registered mail service of the United States Postal Service, and testimony from a law enforcement officer that he mailed or received such substances or narcotic drugs by registered mail together with the return receipts accompanying such mailing shall be prima facie evidence that said substances or drugs are the substances or drugs so seized.

At any time after the seizure of a controlled substance or narcotic drug, a district attorney or the attorney general may petition the superior court in the name of the commonwealth to order the destruction of said controlled substance or narcotic drug seized in the course of any arrest or investigation. The court shall order the commonwealth to give notice by certified or registered mail to the known defendant and his attorney and shall promptly, but not less than two weeks after notice, hold a hearing on the petition. At such hearing, the court shall hear evidence from the parties on the issue of destruction, the preservation of samples, the inspection, examination and testing of the controlled substance or narcotic drugs. The court after such hearing, shall have the power to order the forfeiture and destruction of such controlled substance or narcotic drug as it so determines, under procedures and to the extent as so determined by the court, with the remainder to be kept under the provisions of this section and shall thereupon issue a final order in writing.

Such final order shall provide for the analysis of representative and fair samples of such forfeited controlled substances or narcotic drugs by a chemist of the department of public safety or by a chemist at the University of Massachusetts medical school or by an analyst of the department of public health who shall issue a signed certificate, on oath, of the results of such analysis. Such certificate shall be sworn to before a justice of the peace or a notary public and shall be prima facie evidence of the composition and quality of such controlled substances or narcotic drugs when introduced as evidence before a grand jury or any court proceeding in the commonwealth. Upon completion of such analysis, such order shall direct the evidence officer to deliver such controlled substances or narcotic drugs ordered destroyed to the department for such destruction or disposition in any way not prohibited by law; provided, however, that the evidence officer shall make proper provisions for maintaining and securing such samples as may be directed by the court.

Upon final disposition of criminal charge, forfeited drugs to be delivered to Dept. of Public Health

The court having jurisdiction shall, upon completion of a trial or other disposition by the trial court and after the expiration of the period for an appeal from that trial or disposition, in writing, order such forfeited controlled substances or narcotic drugs not destroyed prior thereto to be caused to be delivered forthwith by the evidence officer to the department for destruction or disposition in any way not prohibited by law. In the event of an appeal as prescribed by law, the evidence officer shall retain possession of such controlled substances or narcotic drugs until final disposition of the case, at which time, the district attorney or attorney general may petition the superior court for summary destruction of such controlled substances or narcotic drugs.

The department shall keep a record of the place where such controlled substances or narcotic drugs were seized, of the kinds and quantities of drugs were received, by whose order the controlled substance or narcotic drugs were delivered and received, the date and manner of destruction or disposition of such controlled substances or narcotic drugs, and a report under oath of such destruction or disposition shall be made to the court, which record shall be open to inspection by attorneys of record in the case and by all federal and state officers charged with enforcement of federal and state narcotic laws.

The department may at its discretion upon an official written order, deliver to any hospital within the state, not operated for private gain, any narcotic drugs, except heroin and its salts and derivatives, for medicinal purposes.

The department shall keep a complete record of all drugs received and of all drugs disposed of, showing the exact kinds, quantities and forms of such drugs; the persons from whom received and the dates of receipt, disposal or destruction, which record shall be open to inspection by all federal and state officers charged with enforcement of federal and state narcotic laws.

Section 48. Severability.

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the chapter which can be given effect without the invalid provisions or application, and to this end the provisions of this chapter are severable.

RELATED STATUTES

Chapter 94, Section 187D. Penalty for violation of sections 186-195. Whoever, for the purpose of evading or assisting in the evasion of any provisions of ... falsely represents that he is a physician, dentist podiatrist or veterinarian or that he is a manufacturer or jobber in drugs, or a licensed wholesale druggist, or that he is a pharmacist actively engaged in the business as such, or

that he is a superintendent or official in immediate charge of an incorporated hospital, college or scientific institution shall be punished by a fine of not more than one thousand dollars or by imprisonment in a jail or house of correction for not more than two years or both.

Chapter 276, Section 3. Disposition of property. If an officer in the execution of a search warrant finds property or articles therein described, he shall seize and safely keep them, under the direction of the court or justice, so long as necessary to permit them to be produced or used as evidence in any trial. As soon as may be, thereafter, all property seized under clause First of section one shall be restored to the owners thereof; and all other property seized in execution of a search warrant shall be disposed of as the court or justice orders and may be forfeited and either sold or destroyed, as the public interest requires, in the discretion of the court or justice, except:

- (a) Not pertinent to drug law
- (b) Rifles, shotguns, pistols, knives or other dangerous weapons which have been found to have been kept, concealed or used unlawfully or for an unlawful purpose shall be forfeited to the commonwealth and delivered forthwith to the commissioner of public safety for destruction or preservation in the discretion of the commissioner of public safety.
- (c) Money seized under clause Third of section one shall be forfeited and paid over to the state treasurer.
- (d) Any property the forfeiture and disposition of which is specified in any general or special law, shall be disposed of in accordance therewith.

Chapter 277, Section 38 Allegations, Presumptions, and Proof in Prosecutions; Chapter 94C. In a prosecution under any provision of Chapter 94C, for manufacturing, dispensing or distributing a controlled substance in violation of any provision of said chapter, it shall be sufficient to allege that the defendant did unlawfully manufacture, dispense or distribute, as the case may be, such alleged substance, without any further allegations, without naming the person to whom it dispensed or distributed, or quantity of the substance; but the defendant shall be entitled to a bill of particulars. In such a prosecution, a defendant relying upon a prescription, written order, receipt, registration, appointment or authority, or exemption as a defense or justification shall prove the same, and until he has proved it the presumption shall be that he is not so justified or authorized.

CHAPTER 111E

DRUG REHABILITATION

Section 1 Definitions. For the purposes of this chapter the following words shall, unless the context requires otherwise, have the following meanings:

Administrator, the person in charge of the operation of a facility or a penal facility, or his designee.

Advisory board, the drug rehabilitation advisory board.

Assignment, the order of the court, pursuant to the defendant's request, placing the defendant, if determined to be a drug dependent person who would benefit by treatment, in the care of a drug treatment facility.

Dependency related drug, a controlled substance as defined in section one of chapter ninety-four C.

Director, the director of the division of drug rehabilitation.

Division, the division of drug rehabilitation.

Drug, any controlled substance as defined in chapter ninety-four C, or glue or cement, as defined in section nineteen of chapter two hundred and seventy.

Drug dependent person, a person who is unable to function effectively and whose inability to do so causes, or results from, the use of a drug other than alcohol, tobacco or lawful beverages containing caffeine, and other than from a medically prescribed drug when such drug is medically indicated and the intake is proportioned to the medical need.

Drug offense, an act or omission relating to a dependency related drug which constitutes an offense pursuant to section twenty-one or subdivision (1) of section twenty-four of chapter ninety; section eight of chapter ninety B; chapter ninety-four C or section sixty-two of chapter one hundred and thirty-one; provided, however, in the case of a juvenile this definition shall be applicable if said juvenile is charged with being delinquent by reason of an offense pursuant to said sections.

Facility, any public or private place, or portion thereof, which is not part of or located at a penal institution and which is not operated by the federal government, providing services especially designed for the treatment of drug dependent persons or persons in need of immediate assistance due to the use of a dependency related drug.

Federal facility, any place, or portion thereof, operated by the federal government, which is not part of or located at a penal institution providing services especially designed for the treatment of drug dependent persons or persons in need of immediate treatment due to the use of a dependency related drug.

First drug offense, that illegal act which stands pending for trial. Persons arrested for prior drug offenses in which the case has been terminated favorably to the defendant, shall be considered as a first drug offender.

Independent psychiatrist, a psychiatrist, other than one holding an office or appointment in any department, board, or agency of the commonwealth, or in any public facility or penal facility.

Independent physician, a physician, other than one holding an office or appointment, in any department, board, or agency of the commonwealth, or in any public facility or penal facility.

Patient, a person admitted to any facility for treatment.

Penal facility, an institution, or any part thereof, other than an institution, or any part thereof operated by the federal government, for the detention or confinement of persons accused or convicted of crime, including, but not limited to, jails, prisons, houses of correction and correctional institutions, providing services especially designed for the treatment of drug dependent persons.

Physician, a physician registered in accordance with chapter one hundred and twelve.

Private facility, a facility, other than one operated by the federal government, the commonwealth or any political subdivision thereof.

Psychiatrist, a physician who has board certification or board eligibility in psychiatry.

Public facility, a facility operated by the commonwealth or any political subdivision thereof.

Sale, includes but is not limited to any dispensing or distribution which constitutes an offense pursuant to the provisions of chapter ninety-four C.

Tolerance, a state in which increased dosage of a dependency related drug is required to produce the physiological and psychological effects of prior dosages.

Treatment, services and programs for the care and rehabilitation of drug dependent persons, or persons in need of immediate assistance due to the use of a dependency related drug, including, but not limited to, medical, psychiatric, psychological, vocational, educational, and recreational services and programs.

Withdrawal, the involuntary physical and psychological reaction or illness which occurs when the intake of a dependency related drug to which the user has developed a tolerance is abruptly terminated.

Section 2. Division of drug rehabilitation; functions; director; powers and duties; etc. There shall be in the department a division of drug rehabilitation. The division shall take cognizance of all matters affecting drug dependency in the commonwealth. The director shall be the chief administrative and executive officer of the division. He shall administer the rules and regulations of the division and shall prepare proposed rules and regulations for the consideration of the commissioner. He shall submit annually to the commissioner a report containing recommendations for legislation relating to drug dependency.

The approval of the commissioner shall be required for any budgetary request of the division, the planning and construction of facilities by the division, any exercise of the power of eminent domain by the division, all contracts and agreements entered into by the division relating to the use and occupation of real property, and any application by the division for a grant or loan from the federal government.

The director shall, subject to the approval of the commissioner, appoint the administrator of each facility operated by the division pursuant to this chapter. Each such administrator shall be a person qualified by training and experience to operate a facility for the treatment of drug dependent persons or persons in need of immediate assistance due to the use of a dependency related drug.

The director may, subject to the approval of the commissioner, appoint such hearings officers as may be necessary. Hearings of the division shall be conducted by the director or a hearings officer. The director may also, subject to the approval of the commissioner, establish such other positions and employ such additional personnel and consultants as he may consider appropriate to carry out the provisions of this chapter. The provisions of chapter thirty-one shall not apply to the director, physicians, psychiatrists, and psychologists who have full medical, psychiatric or psychological responsibility, whichever is applicable, as opposed to administrative responsibility, or to nurses; provided, however, that all persons so employed and all positions established which, as a condition of receiving federal grants for programs and activities to which federal standards for a merit system of personnel administration relate, made necessary the application of the provisions of the civil service law shall be subject to the provisions of chapter thirty-one if such federal standards are uniform in all states.

Section 3. Drug rehabilitation advisory board, membership; terms of office, etc.

There shall be in the division a drug rehabilitation advisory board, consisting of the commissioners of public health, correction, rehabilitation and education, the commissioner of youth services, the commissioner of probation and seven experts in the field of drug dependency appointed by the governor, at least one of whom shall be a rehabilitated drug dependent person. Of the members first appointed, two shall be appointed for a term of one year, two shall be appointed for a term of two years, and three shall be appointed for a term of three years. Thereafter the governor shall appoint members to succeed those appointed members whose terms expire to serve for terms of three years. Each appointed member shall serve until his successor is appointed and has qualified. No member shall be appointed to serve more than two consecutive three year terms. The members of the advisory board shall serve without compensation but shall be reimbursed for their expenses actually and necessarily incurred in the discharge of their duties. The governor shall annually designate the chairman of the advisory board from among its members.

The advisory board shall in its general advisory capacity assist the director in coordinating the efforts of all public agencies and private organizations and individuals within the commonwealth concerned with the prevention of treatment of drug dependency, providing for the most efficient and effective utilization of resources and facilities, and developing a comprehensive program for treatment of drug dependent persons and persons in need of immediate assistance due to the use of a dependency related drug. The advisory board shall make an annual report to the governor and a copy thereof shall be made available to the commissioner and to the secretary of human services.

The commissioner of mental health shall be an ex officio member of the advisory board and in such capacity shall advise and make recommendations to the advisory board.

Section 4. Preparation, etc., of plans for treatment of drug dependent persons.

The director shall, subject to the approval of the commissioner, prepare and submit to the governor, and from time to time amend, a comprehensive plan for the treatment in public, private, and federal facilities of drug dependent persons and persons in need of immediate assistance due to the use of a dependency related drug. The director, in developing such plan, shall consult with the advisory board, officials of appropriate departments or agencies of the federal government and the commonwealth and its political subdivisions, and private organizations and individuals with a view toward providing coordinated and integrated services on the community level. The plan shall include a detailed estimate of the cost of its implementation and of the extent to which funds, property or services may be available from the commonwealth or any of its political subdivisions, the federal government or any private source.

Section 5. Establishment of treatment program; facilities to be provided, etc.

The division shall establish a comprehensive program for the treatment of drug dependent persons and persons in need of immediate assistance due to the use of a dependency related drug. The director, subject to the approval of the commissioner, shall divide the commonwealth into not less than four nor more than ten regions for the conduct of said program and shall establish standards for the development of the program on the regional level. In establishing such regions, consideration shall be given to city, town and county lines, population concentrations, the regions established by the department of mental health pursuant to section seventeen of chapter nineteen, and any relevant uniform rules and regulations promulgated by the commissioner of administration and finance.

The program of the division shall include provision for at least the following:

- (a) Facilities wherein treatment is available to persons in need of immediate assistance due to the use of a dependency related drug;
- (b) Facilities wherein inpatient treatment is available which shall, to the extent appropriate and possible, be affiliated with and constitute an integral part of the medical service of a general hospital;
- (c) Facilities wherein outpatient treatment is available;
- (d) Facilities wherein residential aftercare is available, such as in halfway houses;
- (e) Penal facilities.

The department shall provide sufficient treatment facilities, public or private, for the treatment of drug dependent persons committed or admitted pursuant to the provisions of this chapter.

The division shall maintain, supervise and control all facilities operated by it pursuant to this chapter and all such facilities shall be staffed with an adequate number of qualified and trained personnel. The administrator of each such facility shall make an annual report of its activities to the director in such form and manner as the director deems appropriate.

All appropriate resources, particularly community mental health centers, shall be coordinated with and utilized in the program whenever possible.

The director shall prepare and publish annually a list of all facilities, including federal facilities, operating in accordance with this chapter and shall make it available to all district and superior court judges within the commonwealth on an annual basis and to members of the public upon request. Such list shall include; but not be limited to the following:

- (a) eligibility for treatment
- (b) scope of treatment offered
- (c) applicable facility fees
- (d) last known patient capacity
- (e) facilities for emergency treatment

Notices shall be sent quarterly by the director to all district and superior court judges within the commonwealth containing updated information on such list. Said notices shall also state the last known waiting period for admission to each facility.

Section 6. Rehabilitation division, powers and duties. The division is hereby authorized, empowered and directed to:

- (1) Plan, construct, establish, cause to be established and maintain such facilities as may be necessary or desirable for the conduct of its program;
- (2) Acquire, hold and dispose of personal property;
- (3) Acquire by purchase or otherwise, on such terms and conditions and in such manner as it may deem proper, or by the exercise of the power of eminent domain, and lease, hold and dispose of, real property or any interest therein, for the establishment of facilities under the provisions of this chapter; provided, however, that no real property or any interest therein used in whole or in part for residential purposes may be so taken by eminent domain;
- (4) Make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers; including, but not limited to, contracts with public and private departments, agencies, and facilities to pay them for services actually rendered or furnished to drug dependent persons or persons in need of immediate assistance due to the use of a dependency related drug at rates to be

established pursuant to chapter six A; provided, however, that the commissioner shall promulgate rules and regulations establishing the standards and procedures which shall govern such fee-for-service contracting, which standards and procedures shall include, but shall not be limited to, the proper operation of facilities, the need for fee-for-service contracting in the community, and the qualifications of the applicant;

- (5) Solicit and accept for use in relation to the purposes of this chapter any gift of money or property made by will or otherwise, and any grant or loan of money, services or property from the federal government, the commonwealth or any political subdivision thereof or any private source, and to all things necessary to cooperate with the federal government or any of its agencies in connection with the application for such grant; provided, however, that any money received under this subsection shall be turned over to the state treasurer to be kept in a separate fund in the treasury;
- (6) Develop, encourage and foster statewide, regional and local plans and programs for the prevention and treatment of drug dependency in cooperation with interested public agencies and private organizations and individuals and provide technical assistance and consultation services for these purposes;
- (7) Coordinate the efforts and enlist the assistance of all public agencies and private organizations and individuals interested in the prevention and treatment of drug dependency;
- (8) Cooperate with the department of correction in establishing and conducting programs to provide treatment for drug dependent persons in penal institutions;
- (9) Cooperate with the department of education, schools, police departments, courts, and other public agencies and private organizations and individuals in establishing programs for the prevention and treatment of drug dependency and in preparing curriculum materials for use at all levels of public school education;
- (10) Prepare, publish and disseminate educational material dealing with the prevention, nature and effects of drug dependency and the benefits of rehabilitation;
- (11) Develop and implement, as an integral part of treatment programs established pursuant to this chapter an educational program for use in the treatment of drug dependent persons, especially drug dependent persons who are not drug addicts, which program shall include the dissemination of factual information concerning the nature and effects of dependency related drugs and drug dependency;

- (12) Organize and foster training programs for professional and non-professional workers in the treatment of drug dependent persons;
- (13) Keep records and engage in research and the gathering of statistics relevant to the purposes of this chapter;
- (14) Utilize the support and assistance of interested persons in the community, particularly rehabilitated drug dependent persons, in encouraging voluntary participation in the program by drug dependent persons and persons in need of immediate assistance due to the use of a dependency related drug;
- (15) Serve as a clearinghouse for information relating to drug dependency;
- (16) Approve and license public and private facilities in accordance with section forty-four; and
- (17) Do all other acts and things necessary or convenient to carry out the powers expressly granted to it for the exercise of its powers and the performance of its duties.

Section 7. Licensing of private facilities. The division shall issue for a term of two years, and may renew for like terms, a license, subject to revocation by it for cause, to any person, partnership, corporation, society, association or other agency or entity of any kind, other than a licensed general hospital or a department, agency or institution of the federal government, the commonwealth or any political subdivision thereof, deemed by it to be responsible and suitable to establish and maintain a facility and to meet applicable licensure standards and requirements. In the case of a department, agency or institution of the commonwealth or any political subdivision thereof, the division shall grant approval to establish and maintain a facility for a term of two years, and may renew such approval for like terms, subject to revocation by it for cause. The division may issue a provisional license or approval where a facility has not previously operated, or is operating but is temporarily unable to meet applicable standards and requirements. The commissioner shall promulgate rules and regulations establishing licensure and approval standards and requirements, but such standards and requirements shall concern only:

- (1) the health standards to be met by a facility,
- (2) misrepresentations as to the treatment to be afforded patients at a facility,
- (3) licensing fees, and

- (4) procedures for making and approving license applications.
- (5) the services and treatment provided by programs.
- (6) certification of capability of self-preservation.

Each facility shall file with the division from time to time, on request, such data, statistics, schedules or information as the division may reasonably require for the purposes of this section, and any licensee or other person operating a private facility who fails to furnish any such data, statistics schedules or information as requested, or who files fraudulent returns thereof, shall be punished by a fine of not more than five hundred dollars.

The division, after holding a hearing in accordance with sections ten through thirteen, inclusive, of chapter thirty A, may refuse to grant, suspend, revoke, limit or restrict the applicability of or refuse to renew any license or approval for the following reasons only:

- (1) for failure to meet the requirements of its rules and regulations under this section or
- (2) if there is a reasonable basis for the division to conclude that there is a discrepancy between representations by a facility as to the treatment services to be afforded patients and the treatment services actually rendered or to be rendered.

The division may temporarily suspend a license or approval in an emergency without holding a prior hearing; provided, however, that upon request of an aggrieved party, a hearing in accordance with sections ten through thirteen, inclusive, of chapter thirty A shall be held as soon after the license or approval is suspended as possible. Any party aggrieved by a final decision rendered or

- (3) for failure to comply with the provisions of section ten by the director or a hearing officer after a hearing of the division pursuant to this section may petition for judicial review thereof in accordance with the provisions of section fourteen of chapter thirty A.

No person, partnership, corporation, society, association, or other agency, or entity of any kind, other than a licensed general hospital, a department, agency or institution of the federal government, the commonwealth or any political subdivision thereof, shall operate a facility without a license and no department, agency or institution of the commonwealth or any political subdivision thereof shall operate a facility without approval from the division pursuant to this section. The superior court shall have jurisdiction in equity upon petition of the division to restrain any violation of the provisions of this section and to take such other action as equity and justice may require to enforce its provisions.

Whoever knowingly establishes or maintains a private facility other than a licensed general hospital without a license granted pursuant to this section shall, for a first offense, be punished by a fine of not more than five hundred dollars and for each subsequent offense by a fine of not more than one thousand dollars or imprisonment for not more than two years, or both.

Each facility shall be subject to visitation and inspection by the division and the division shall inspect each facility prior to granting or renewing a license or approval. The division may examine the books and accounts of any facility if it deems such examination necessary for the purpose of this section.

The division is hereby authorized to make a complaint to a district court or to a justice of the superior court, who may thereupon issue a warrant to any officers or employees of the division authorizing them to enter and inspect at reasonable times, and to examine the books and accounts of, any private facility refusing to consent to such inspection or examination by the division which the division has reason to believe is operating in violation of the provisions of this chapter. Refusal by the operator or owner to allow such entry and inspection pursuant to such a warrant shall for a first offense be punished by a fine of not more than one hundred dollars and for each subsequent offense by a fine of not more than one thousand dollars or imprisonment for not more than two years, or both.

For the purposes of this section, the term facilities shall include penal facilities.

Section 8. Admission of drug dependent persons to facilities. Any person who believes that he is a drug dependent person may apply for admission to a facility. Such application may be directed to the director or to the administrator of a public or private facility.

Upon receipt by the director of an application for admission, he shall designate a psychiatrist or, if, in the discretion of the director, it is impracticable to do so, a physician to make an examination of the person to determine whether or not he is a drug dependent person who would benefit by treatment. The psychiatrist or physician shall report his findings in writing to the director after the completion of the examination, stating the facts upon which the findings are based and the reasons therefor.

If the director finds that the person is a drug dependent person who would benefit by treatment, he may cause him to be admitted to a facility as an inpatient or outpatient.

In determining whether to admit to a facility a person who is reported to be a drug dependent person who would benefit by treatment the director shall consider the past record of treatment, if any, afforded the person, at a facility, and whether or not the person complied with the terms of any prior admission made pursuant to this section.

The administrator may transfer any inpatient to an outpatient program if he finds that the patient is proper subject for an outpatient program; provided, however, that the administrator may return any such patient to an inpatient program if he deems it appropriate. A patient originally admitted to a facility as an outpatient under this section shall not be transferred to an inpatient program without his written consent.

Each patient admitted under this section shall be subject to the supervisory powers of the administrator exercised in accordance with rules and regulations promulgated by the division.

Before causing a person to be admitted to a facility, the director may make a recommendation to the person as to the period deemed necessary to accomplish adequate and appropriate treatment, but in no case shall the period exceed one year. The director shall also notify the person of the nature of the treatment to be afforded and the facility to which he will be admitted. If the person consents in writing to the admission to the facility, the period deemed necessary to accomplish treatment and the nature of the treatment, he may be admitted to a facility.

If the director decides that the applicant is to be refused admission to a facility because he is not a drug dependent person who would benefit by treatment or because adequate treatment is not available at an appropriate facility, he shall make known in writing to the applicant the basis for his decision.

In the case of an application for admission made to the administrator of a public facility, or a private facility with which the division contracts on a fee-for-services basis pursuant to clause (4) of section six, other than a halfway house, the administrator shall follow the same procedures regarding admission, transfer, and discharge as those prescribed in this section for the director. In the case of an application for admission made to the administrator of a private facility with which the division does not contract on a fee-for-services basis pursuant to said clause (4) other than a halfway house, the administrator shall follow such procedures regarding admission, transfer and discharge as are provided for by rules and regulations to be promulgated by the division; provided, however, that when an application is made to the administrator of any facility pursuant to this section, and the administrator determines that his facility is unable to furnish the applicant adequate and

appropriate treatment, he may request the assistance of the director in placing the applicant in another facility at which adequate and appropriate treatment is available. If the director determines that the facility is unable to furnish adequate and appropriate treatment to said applicant, he shall provide the administrator with such assistance.

A patient admitted to a facility under this section may receive treatment at the facility so long as the administrator believes that it will continue to benefit him. Any patient may, at that time, notify the administrator in writing that he wishes to terminate treatment. Upon receipt of any such notification the administrator shall determine whether further treatment would benefit the patient, and shall inform the patient of his determination. If the administrator determines that he would not benefit by such further treatment, the patient shall be discharged from the facility. If the administrator determines he would so benefit, he shall so advise the patient. If the patient chooses to terminate treatment despite the determination by the administrator that the patient would benefit by further treatment at the facility, the administrator shall notify the director that the patient has caused treatment to be terminated during the recommended period against the advice of the administrator. If the patient applies for readmission for treatment in any facility, the fact that treatment has been terminated during the recommended period against the advice of the administrator may be considered in determining whether or not to readmit him, and, in the event that the patient is readmitted, in determining to which facility he should be readmitted for treatment.

Section 9. Admission of drug dependent persons to facilities; emergency treatment. Any facility may afford emergency treatment to a drug dependent person or a person in need of immediate assistance due to the use of a dependency related drug if the person requests such treatment. The term of emergency treatment shall not exceed forty-eight hours without compliance with the provisions of section eight relating to procedures for admission to a facility; provided, however, that if prior to the termination of the emergency treatment period the person applied for admission pursuant to section eight, he may, in the discretion of the administrator, continue to receive treatment at the facility while his application is under consideration.

Section 10. Assignment of defendants charged with drug offenses to treatment center; disposition of criminal charges, etc. Any defendant who is charged with a drug offense shall, upon being brought before the court on such charge, be informed that he is entitled to request an examination to determine whether or not he is a drug dependent person who would benefit by treatment and that if he chooses to exercise such right he must do so in writing within five days of being so informed.

If the defendant requests such an examination, the court may in its discretion determine that the defendant is a drug dependent person, who would benefit by treatment, without ordering the examination. In such event the court shall inform the defendant that he may request assignment to a drug treatment facility, and advise him of the consequences of assignment and that if he is so assigned the court proceedings shall be stayed for the term of such assignment.

The court proceedings shall be stayed for the period during which a request made under this section is under consideration by the court. If the defendant requests an examination, the court shall, unless the court has already determined that the defendant is a drug dependent person, appoint a psychiatrist, or if it is, in the discretion of the court, impracticable to do so a physician, to conduct the examination at an appropriate location designated by it. In no event shall the request for such an examination or any statement made by the defendant during the course of the examination, or any finding of the psychiatrist or physician be admissible against the defendant in any court proceedings.

The psychiatrist or physician shall report his findings in writing to the court within five days after the completion of the examination, stating the facts upon which the findings are based and the reasons therefor.

If the defendant is also charged with a violation of any law other than a drug offense, the stay of the court proceedings may be vacated by the court upon the report of the psychiatrist or physician, whereupon the report shall be considered upon disposition of the charges in accordance with sections eleven and twelve, and the remaining provisions of this section shall not apply. If the defendant is charged with a drug offense only and if the psychiatrist or physician reports that the defendant is a drug dependent person who would benefit by treatment, the court shall inform the defendant that he may request assignment to a drug treatment facility, and advise him of the consequences of the assignment and that if he is so assigned the court proceedings shall be stayed for the term of such assignment.

If the defendant requests assignment and if the court determines that he is a drug dependent person who would benefit from treatment the court may stay the court proceedings and assign him to a drug treatment facility.

An order assigning a person under this section shall specify the period of assignment, which shall not exceed eighteen months or the period of time equal to the maximum sentence he could have received had he been found guilty of every count alleged in the complaint indictment, whichever is shorter.

In determining whether or not to grant a request for assignment under this section, the court shall consider the report, the past criminal record of the defendant, the availability of adequate and appropriate treatment at a facility, the nature of the offense with which the defendant is charged including, but not limited to, whether the offense charged is that of a sale or sale to a minor, and any another relevant evidence.

In the event that the defendant requests assignment and if the court determines that the defendant is a drug dependent person who would benefit by treatment, and the defendant is charged for the first time with a drug offense not involving the sale or manufacture of dependency related drugs, and there are no continuances outstanding with respect to the defendant pursuant to this section, the court shall order that the defendant be assigned to a drug treatment facility without consideration of any other factors.

Before such assignment, the court shall consult with the facility or the division, to determine that adequate and appropriate treatment is available.

If the defendant requests assignment, and if the court determines that the defendant is a drug dependent person who would benefit by treatment, and the defendant is charged for the first time with a drug offense not involving the sale or manufacture of dependency related drugs and there are no continuances outstanding with respect to the defendant pursuant to this section, and adequate and appropriate treatment at a facility is not available, the stay of court proceedings shall remain in effect until such time as adequate and appropriate treatment at a facility is available.

In all other cases, an assignment order shall not be made unless, after consultation with the facility or the division, the court determines that adequate and appropriate treatment is available, provided, however, that the court may in its discretion order that the stay of court proceedings remain outstanding until such time as adequate and appropriate treatment is available.

In the event that the stay of the court proceedings remains in effect for the reason that adequate and appropriate treatment at a facility is not available, the issue of the availability of adequate and appropriate treatment at a facility may be reopened at any time by the court on its own motion, or on motion by the prosecutor, or the defendant.

In no event shall any defendant be assigned pursuant to this section unless the defendant consents in writing to the terms of the assignment order.

If the psychiatrist or physician reports that the person is not a drug dependent person who would benefit by treatment, the defendant shall be entitled to request a hearing to determine whether or not he is a drug dependent person who would benefit by treatment.

The court may on its own motion, or shall, upon request of the defendant or his counsel, appoint an independent psychiatrist, or if it is impracticable to do so, an independent physician to examine the defendant and testify at the hearing. If the court determines that the defendant is a drug dependent person who would benefit by treatment, the procedures and standards applicable to a defendant who is determined by the court, following the report of the first examining psychiatrist or physician to be a drug dependent person who would benefit by treatment, shall apply to the defendant.

If the court does not assign the defendant to a facility, the stay of the court proceedings shall be vacated.

At any time during the term of assignment, the administrator may transfer any inpatient to an outpatient program if he finds that the patient is a proper subject for an outpatient program; provided, however, that the administrator may retransfer the patient to an inpatient program if he finds that the person is not suitable for outpatient treatment, and provided further that immediately upon such transfer the administrator shall notify in writing the assigning court and the director of such transfer.

Any patient assigned under this section may apply in writing to the assigning court for discharge or transfer either from inpatient or outpatient treatment or from one facility to another; provided, however, that not more than one such application may be made in any three-month period. Upon receipt of an application for discharge or transfer, the court shall give written notice to the patient of his right to a hearing and to be represented by counsel at the hearing.

Within ten days of the receipt by the court of an application for discharge, the administrator and an independent psychiatrist, or, if none is available, an independent physician, designated by the court to make an examination of the patient shall report to the court as to whether or not the patient would benefit from further treatment at a facility. If the court determines that the patient would no longer so benefit, the patient's application for discharge shall be granted. If the court does not so determine, said application shall be denied.

Within ten days of the receipt by the court of an application for transfer, the administrator shall report to the court as to whether the patient is a proper subject for the transfer for which he has made application. If the court determines that the patient is a proper subject for the transfer, the patient's application for transfer shall be granted and the assigning court shall be so notified. If the court does not so determine, said application shall be denied.

Throughout the period of assignment at a facility pursuant to this section, the administrator of said facility shall provide quarterly written reports on the progress being made in treatment by the defendant to the assigning court. Failure to comply may be grounds for suspension of the facility's license. At the end of the assignment period, or when the patient is discharged by the administrator, or when the patient prematurely terminates treatment at a facility, whichever occurs first, the administrator shall notify in writing the assigning court and the director of such termination, and further shall state the reasons for such termination, including whether the defendant successfully completed the treatment program.

In reaching its determination of whether or not the defendant successfully completed the treatment program the court shall consider, but shall not be limited to, whether the defendant cooperated with the administrator and complied with the terms and conditions imposed on him during his assignment. If the report states that the defendant successfully completed the treatment program, or if the defendant completes the term of treatment ordered by the court, the court shall dismiss the charges pending against the defendant. If the report does not so state, or if the defendant does not complete the term of treatment ordered by the court, then, based on the report and any other relevant evidence, the court may take such action as it deems appropriate, including the dismissal of the charges or the revocation of the stay of the court proceedings.

As to any defendant determined by the court pursuant to this section to be a drug dependent person who would benefit by treatment, concerning whom the court does not order assignment in lieu of prosecution, the court may in the event that such person is convicted of the criminal charges, order that he be afforded treatment pursuant to either section eleven or twelve. The provisions of this section shall apply to juveniles in the same manner and under the same terms and conditions as adults; provided that no juvenile shall be committed to a facility without the consent of his parents or guardian.

The provisions of this section shall apply to proceedings in the superior court provided, however, that no defendant who has been examined for his drug dependency pursuant to this section in a district court shall have the right to a new examination if his case is bound over or appealed to the superior court; provided, however, that a superior court judge may, in his discretion, grant a second such drug examination.

During any stays authorized by this section, the court may in its discretion place the defendant in the care of a probation officer until he is accepted at a facility. For the purposes of this section, the term "facility" shall include federal facilities.

The provisions of this section shall not apply to a person charged with violating Sections 32 through 32G inclusive, of Chapter 94C of the General Laws.

Section 11. Commitment of persons found guilty of law violations other than drug offenses, etc. Any person found guilty of a violation of any law other than a drug offense, who prior to disposition of the charge, states that he is a drug dependent person and requests an examination shall be examined by a psychiatrist or, if, in the discretion of the court, it is impracticable to do so by a physician, to determine whether or not he is a drug dependent person who is a drug addict who would benefit by treatment or a drug dependent person who is not a drug addict but who would benefit by treatment.

If the defendant has previously been examined, pursuant to a request for an examination made in accordance with section ten, the report of the physician or psychiatrist who conducted the examination shall serve at the examination provided for under this section.

The examination shall be conducted at any appropriate location upon appropriate order of the court. In no event shall the request for such examination or any statement made by the defendant during the course of the examination or any finding of the psychiatrist or physician be admissible against the defendant in any criminal proceeding. The psychiatrist or physician shall report in writing to the court within five days after the completion of the examination, stating the facts upon which the report is based and the reasons therefor.

If the report states that the defendant is a drug dependent person who would benefit by treatment, and if the court orders that the defendant be confined to a jail, house of correction, prison, or other correctional institution, the court may further order that the defendant be afforded treatment at a penal facility for the whole or any part of the term of imprisonment; provided, however, that the court shall determine the term of treatment to be afforded with the advice of the administrator of the penal facility; and provided, further, that the court shall not order the defendant be afforded treatment at a penal facility unless the defendant consents to the order in writing. The administrator may terminate treatment of the defendant at such time as he determines the defendant will no longer benefit by treatment.

If the report states that the defendant is not a drug dependent person who would benefit by treatment, the defendant shall be entitled to request a hearing on whether or not he is a drug dependent person who would benefit by treatment. If the court determines that he is a drug dependent person who would benefit by treatment, and if the court orders that the defendant be confined to a jail, house of correction, prison, or other correctional institution, the court may order that the defendant be afforded treatment at a penal facility in accordance with the standards and procedures set forth in this section.

If the court does not order that the defendant be confined to a jail, house of correction, prison, or other correctional institution, the court may order that the defendant be afforded treatment pursuant to section twelve.

Section 12. Commitment as condition of probation; breach of probation. Any court may, in placing on probation a defendant who is a drug dependent person who would benefit by treatment, impose as a condition of probation that the defendant receive treatment in a facility as an inpatient or outpatient; provided, however, that the court shall not impose such a condition of probation unless, after consulting with the facility, it determines that adequate and appropriate treatment is available. The defendant shall receive treatment at the facility for so long as the administrator of the facility deems that the defendant will benefit by treatment, but in no event shall he receive treatment at the facility for a period longer than the period of probation ordered by the court. A periodic program of urinalysis may be employed as a condition of probation to determine the drug free status of the probationer. The cost of the administration of such program shall be borne by the commonwealth. If at any time during the period of treatment the defendant does not cooperate with the administrator or the probation officer, or does not conduct himself in accordance with the order or conditions of his probation, the administrator or the probation officer may make a report thereon to the court which places him on probation, which may consider such conduct as a breach of probation.

Throughout the period of probation at a facility pursuant to this section, the administrator of said facility shall provide quarterly written reports on the progress made in treatment by the defendant to the defendant's probation officer.

Section 13. Acceptance of juveniles and youthful offenders for treatment. The division shall accept for referral juveniles and youthful offenders referred to the division by the department of youth services. Application by the department of youth services for such referral shall be made to the director.

Upon receipt by the director of a request for referral from the youth service board, he shall, unless the person has been examined pursuant to section ten, designate a psychiatrist or, if in the discretion of the director it is impracticable to do so, a physician, to make an examination of the person to be referred to determine whether or not he is a drug dependent person who would benefit by treatment. The psychiatrist or physician shall report his findings in writing to the director after the completion of the examination, stating the facts upon which the findings are based and the reasons therefor.

If the director finds that the person is a drug dependent person who would benefit by treatment and that adequate treatment is available at an appropriate facility, he may recommend to the department of youth services that the person be admitted to the facility as an inpatient or an outpatient.

In determining whether to admit to a facility a person who is reported to be a drug dependent person who would benefit by treatment, the director shall consider the past record of treatment, if any, afforded the person at a facility, and whether or not the person complied with the terms of any prior admission.

If the director decides to admit to a facility a juvenile or youthful offender pursuant to this section, he shall recommend to the department of youth services the period deemed necessary to accomplish adequate and appropriate treatment but in no case shall the period exceed one year. The director shall also notify the department of youth services of the nature of the treatment to be afforded and the facility to which the person will be admitted. If the department of youth services consents in writing to admission to the facility, to the nature of the treatment to be afforded, and to the period deemed necessary to accomplish treatment, the person shall be admitted to the facility.

If the director decides that the referral to the division is to be refused because the juvenile or youth offender is not a drug dependent person who would benefit by treatment or because adequate treatment is not available at an appropriate facility, he shall make known in writing to the department of youth services the basis for this decision.

The referral to the division shall terminate at the conclusion of the period of treatment to which the department of youth services consents, or upon a determination by the director that the juvenile or youthful offender will no longer benefit by treatment, whichever first occurs. If the director determines before the conclusion of the period of treatment to which the department of youth services consents that the juvenile or youthful offender will no longer benefit by treatment, he shall make known in writing to the department of youth services the basis for his decision.

Juveniles and youthful offenders referred to the division pursuant to this section shall remain subject to the jurisdiction and control of the department of youth services for all purposes, including, but not limited to, discharge and release; provided, however, that the treatment to be afforded the juvenile and youthful offenders referred to the division shall be within the jurisdiction and control of the division. In no event, however, shall a juvenile or youthful offender be referred for a period longer than the period during which he is subject to the jurisdiction and control of the department of youth services.

Section 14. Court's findings and orders to be in writing, etc. Each finding determination and order required to be made by any court pursuant to sections thirty-eight to fifty-five, inclusive, and the reasons therefor, shall be in writing and entered in the record of the proceeding.

Section 15. Director's authority to require facilities to admit patients. The director may require the administrator of a public facility or a private facility with which the division contracts on a fee-for-services basis pursuant to clause (4) of section six, other than a halfway house, to admit as an inpatient or an outpatient any person for whom, in the determination of the director, adequate and appropriate treatment is available at the facility. The commissioner shall promulgate rules and regulations governing the extent to which the director may require the administrator of a private facility with which the division does not contract on a fee-for-services basis pursuant to clause (4), other than a halfway house to admit as an inpatient or outpatient any person for whom, in the determination of the director, adequate and appropriate treatment is available at the facility.

Section 16. Persons receiving treatment to be under administrator's supervision. Each person who receives treatment at a facility shall be subject to the supervisory powers of the administrator exercised in accordance with rules and regulations promulgated by the division.

Section 17. Liability for cost of maintenance and treatment. Any patient in a public facility, or the estate, spouse or adult child of such patient, or, if the patient is a minor, the parent of such patient if of sufficient financial ability, shall be liable to such facility for the cost of maintenance and treatment of the patient therein in accordance with rates established pursuant to chapter six A. If a person is a patient in a private facility pursuant to an agreement between the facility and the division, and neither the patient nor the estate, spouse or adult child of such patient, or, if the patient is a minor, the parent of such patient is of sufficient financial ability to pay the cost of maintenance and treatment of the patient therein, and the patient is not entitled to the payment of such cost from any other source, the division shall pay the cost of such maintenance and treatment in accordance with rates established pursuant to chapter six A.

The division shall promulgate rules and regulations governing financial ability which shall take into consideration the income, savings and other personal and real property of the person required to pay, as well as any support actually being furnished by him to any person whom he may be required by law to support.

Section 18. Rights of patients in facilities, etc.

- (a) The administrator of each facility shall keep a record of treatment afforded each patient, which shall be confidential and shall only be made available upon judicial order, whether in connection with pending judicial proceedings or otherwise, where disclosure is authorized by section 408 of the Drug Abuse Office and Treatment Act of 1972 and 21 U.S.C. 1175 or where disclosure is authorized with the informed consent of the patient. Such consent shall be in writing, shall be to the benefit of the patient, and shall be signed by the patient. Such consent shall state the name of the person or organization to whom the disclosure is to be made, the specific type of information to be disclosed, and the purpose or need for such disclosure.
- (b) Any patient shall have the right to have a physician retained by him examine him, consult privately with his attorney, receive visitors, and send and receive communications by mail, telephone and telegraph. Such communications shall not be censored or read without the consent of such patient. The foregoing shall not limit the right of the administrator, subject to reasonable rules and regulations of the division, to prescribe reasonable rules governing visiting hours and the use of telephone and telegraph facilities.
- (c) No patient may be detained in any facility, other than a penal facility, without his consent.
- (d) Insofar as is practicable, a written comprehensive, individualized treatment plan shall be kept by the administrator for each patient.
- (e) Each patient shall be entitled to receive adequate and appropriate treatment.

APPENDIX CLASSES OF CONTROLLED SUBSTANCES

Examples of some of the substances falling into each of the classes follow:
Substances in this class generally have no accepted medical use in the United States.

Alphacetylmethadol	Etorphine
Dextromoramide	Trimeperidine
Phenampromide	Benzylmorphine
Ketobemidone	Acetorphine (M-285)
Phenadoxone	Morphine-N-Oxide
Racemoramide	Codeine-N-Oxide
Heroin	

CLASS B

Substances in this class generally have an accepted medical use in the United States.

Examples of narcotic drugs in this class are:

Opium	Dihydromorphinone
Morphine	(Dilaudid)
Codeine	Oxymorphone (Numorphan)
Cocaine	Methadone (Dolophine)
Oxycodone (Percodan)	Pethidine (Demerol)
	Racemorphan
	(Levodromoran)

Examples of Amphetamine drugs in this class are:

Benzadrine	AmPlus
Dexedrine	Dexobarb
Dexamyl	Amvicel
D.A.S.	Obocell
Eskatrol	Biphетamine
Bamadex	

Examples of Methamphetamine drugs in this class are:

Syndrox	Desbutal
Desoxyn	Norodin
Methedrine	Ambar
Obedrin	

Examples of Barbiturate drugs in this class are:

Amytal	Carbrital
Seconal	Bustisol
Nembutal	Alurate
Tuinal	Mebaral

Other drugs in this class are:

- Phenmetrazine (Preludin)
- Methylphenidate (Ritalin)
- Methaqualone (Quaalude, Parest, Sopor)
- PCP reclassified from Class C to Class B by Stat. 1980, Ch. 241
- Phencyclidine (Angel Dust, PCP)
- Lysergic Acid
- LSD (Lysergic Acid Diethylamide)

CLASS C

Substances in this class include certain hallucinogenic substances which have no accepted medical use in the United States.

Some examples are:

Empirin with Codeine	Codempiral #2
Tylenol with Codeine	Hycodan Syrup
Donnagestic #1	Hycomine Syrup
Paregoric	A.S.A. with Codeine
Soma with Codeine	

In addition to the above narcotic drugs, the following are examples of non-narcotic drugs in Class C:

Methyprylon (Noludar)	MDA (3,4 Methylenedi-oxyamphetamine)
Glutethimide (Doriden)	DET (Diethyltryptamine)
Chlorhexadol	DMT (Dimethyltryptamine)
THC (Tetrahydro-cannabinols)	Mescaline
Diethylamide	Valium
Librium	

Librium (Chloridiazepoxide) and Valium (Diazepam) were reclassified from Class E to Class C by Stat. 1980, Ch. 436

CLASS D

This class contains certain Barbiturates not covered in Class B, tranquilizers and hypnotics and marihuana.

Some Examples are:

- Barbital
- Phenobarbital
- Chloral Hydrate (Noctec,
Felsules, Kessodrate,
Somnos)
- Chloral betaine (Bethachlor)
- Marihuana
- Ethchlorvynol (Placidyl)
- Meprobamate (Equanil,
Miltown, Kessobamate)
- Paraldehyde
- Ethinamate (Valmid)
- Methylphenobarbital

CLASS E

Drugs in this class include those preparations such as the Codeine-containing cough syrups and Opium-containing diarrhea mixtures as well as all prescription drugs not listed in Class A, B, C or D or subsection (a) of Class E of Chapter 94 C.

Some examples are:

- Robitussin -- AC
- Elixir Terpin Hydrate with Codeine
- Cheracol with Codeine
- Penicillin
- Tetracycline
- Parepectolin
- Lomotil
- Cosadein
- Histadyl -- EC Darvon

PENALTIES

Penalty Structure of Chapter 94C

Possession with intent to distribute

2nd offense

Class A - 10 years state prison,
2 1/2 years house of
correction fine of \$1000-\$10,000

5-15 years state prison
and fine of \$2500-\$25,000
(min. mandatory sentence
of 5 years)

Class B - 10 years state prison,
2 1/2 years house of
correction fine of
\$1000-10,000

3-10 years state prison
fine \$2500-25,000
(min. mandatory sentence)
of 3 years)

Phencyclidine

not less than 2 1/2-10 years state prison not less than 1-2 1/2 years house of correc-
tion fine of \$1000-10,000
(min. mandatory sentence of 1 year)

Class C - 5 years state prison
2 1/2 years house of
correction fine of \$500-5000

not less than 2 1/2-10
years state prison
not less than 2 1/2 years house of
correction (min. mandatory sentence
of 2 years)

Class D - 2 years house of
correction fine of \$500-5000

not less than 1 year
2 1/2 years house of correction
fine of \$1000-10,000

Class E - 9 months house of
correction fine of \$250-2500

1 1/2 years house of
correction fine of \$500-5000

Chapter 94 C s 32E - Trafficking

(a) *Marihuana*

50 lbs or more - 100

- not less than 2 1/2 - 15 years state prison
- not less than 1 - 2 1/2 years house of correction
fine \$5,000-10,000
(min. mandatory sentence of 1 year)

100 - 2000 lbs.

- not less than 3 -15 years state prison
fine \$2,500-25,000
(min. mandatory sentence of 3 years)

2,000 - 10,000 lbs.

- not less than 5 - 15 years state prison
fine \$2,500-25,000
(min. mandatory sentence of 5 years)

10,000 lbs. or more

- not less than 10 - 15 years state prison
- fine \$20,000-200,000
(min. mandatory sentence of 10 years)

(b) *Cocaine* - Class B*

28 grams - 100 grams

- not less than 3 - 15 years state prison
- fine \$2,500-25,000
(min. mandatory sentence of 3 years)

100 grams - 200 grams

- not less than 5 - 15 years state prison
- fine \$5,000-50,000
(min. mandatory sentence of 5 years)

200 grams or more

- not less than 10- 15 years state prison
- fine \$20,000-200,000
(min. mandatory sentence of 10 years)

(c) *Heroin* -Class A*

28 grams - 100 grams

- not less than 5 - 20 years state prison
- \$5,000-50,000
(min. mandatory of 5 years)

100 grams - 200 grams

- not less than 10 - 20 years state prison
- fine \$10,000-100,000
(min. mandatory sentence of 10 years)

200 grams or more

- not less than 15 - 20 years state prison
- fine \$50,000-500,000
(min. mandatory sentence of 15 years)

*All gram weights in this section refer to net weights.

CHAPTER 94C

Section 32 G - **counterfeit substances (distribution or possession with intent)**

1 year house of correction

Section 32 H - **drug paraphernalia (sale or possession with intent)**

2 year house of correction

Section 33 - **false prescription**

4 years state prison

2 ½ years house of correction

Section 34 -**possession**

possession heroin (1st) -
(2nd) -

2 years house of correction
not less than 2 ½ - 5 years state
prison
2 ½ years house of correction
\$5,000 fine

Possession class D-E -

6 months house of correction
class E (2nd) 2 ½ years house of
correction

Possession class A, B, or C

1 year house of correction

Section 35 - **Being present - heroin**

1 year house of correction

Section 40 - **conspiracy**

punishment not to exceed the maximum punishment prescribed for the offense,
the commission of which was the object of the conspiracy.

CASE ANNOTATIONS

Possession With Intent to Distribute

M.G.L. c.94C provides that any person who knowingly or intentionally possesses with intent to distribute, manufacture or dispense a controlled substance shall be punished. The punishment for such offense depends on the class of the substance as set forth under section 31 of M.G.L. c.94C and whether it's a first or subsequent offense.

Elements

For a conviction of possession with intent to distribute, each element of the offense must be established beyond a reasonable doubt. The required elements are as follows; (1) possession of a controlled substance, (2) knowingly or intentionally and (3) the intent to distribute. It is important to note that although the violation involves more than possession, it does not require evidence of actual distribution. A person can be charged with both distribution and possession with intent.

Possession

Possession does not require a showing that the drugs were on the person of the defendant. Possession of the controlled substance may be actual possession, where the defendant does have them on his person or it may be "constructive" possession. Actual possession does not depend on the length of time a person has an object under his control; it may be momentary. For example, if a defendant is observed throwing the controlled substance away from his person, possession has been established. Constructive possession requires that the person know the location of the drugs and have the intent and ability to exercise dominion and control over the drugs. Commonwealth v Nichols, 4 Mass. App. Ct. 606, (1976). An individual may exercise such dominion or control in a house or in a motor vehicle. Control does not have to be exclusive. Commonwealth v Duffy, 4 Mass. App. Ct. 655, (1976). Two or more persons may be in joint possession of the same drugs. For example, several individuals may be charged with possession with intent to distribute when arrested in an automobile or house, as long as control over the drugs has been established with regard to each individual. Seizure of personal papers is lawful as evidence to establish control and connection with premises and the controlled substances seized. Commonwealth v Lee, 2 Mass. App. Ct. 700 (1974). Personal papers found in the house where the defendant was arrested with the drugs is used to show control.

Knowingly or Intentional

The possession must be "knowingly or intentional." There must be evidence that the defendant knew he possessed it and that it was a controlled substance. Knowledge, like possession, may be proved by circumstantial evidence. Where evidence is found in inaccessible places, it can be inferred that the defendant placed it there or knew of its existence. Commonwealth v Nichols, 4 Mass. App. Ct. 606 (1976). Knowledge may be also be inferred where the prohibited item is found in open view in an area over which the defendant has control. Commonwealth v Albano, 376 Mass 132 (1977)

Intent to Distribute

There is no presumption that a person possessed the controlled substance with the intent to distribute or sell. Commonwealth v. Craft , 345 Mass. 143 (1962). Absent an admission or statement by the defendant of his intent, proof of intent to distribute is by circumstantial evidence. Commonwealth v. Ellis , 356 Mass. 574 (1970).

Various factors and evidence are admissible to show intent to distribute. In each case, the total circumstances must be viewed to determine if the person simply possessed the drugs or possessed them with an intent to distribute.

In certain instances quantity alone may be sufficient to establish intent. A large quantity of high grade controlled substance may be enough to infer the intent to distribute. Commonwealth v. Rugaber , 369 Mass. 765 (1976), Commonwealth v. Scala , 380 Mass. 500 (1980). On the other hand, it has been held that certain quantities alone have not been sufficient to show intent, e.g. six packets of marijuana or cocaine. See Commonwealth v. Wooden , 14 Mass. App. Ct. 417 (1982).

In many cases, the quantity of the drugs alone is not sufficient to show intent, but the presence of paraphernalia plus the quantity is enough to establish the intent to distribute. Relevant drug paraphernalia includes wrapping papers, vials cutting powder, razors and scales. In Commonwealth v. La Perle , 19 Mass. App. Ct. 424 (1985), the court held that possession with intent can be proven when only residue as well as wrapping papers, scales, cutting substance and vials, taken as a whole permitted the inference of intent to distribute.

Packaging material or drug paraphernalia is relevant to show the defendant was predisposed towards distribution rather than usage alone. Commonwealth v. Davis , 376 Mass. 777 (1978). Such packaging material has been found to include cigarette papers, large quantities of empty capsules. Commonwealth v. Ellis , 356 Mass. 574 (1976), as well as manila envelopes and plastic bags.

Statements by a defendant are certainly relevant toward the issue of intent. For example, a defendant's statement that he intended to sell, give or deliver a controlled substance establish intent to distribute. It should also be considered that in a situation where a large quantity of drugs are found and the defendant stated he did not use drugs, the intent to sell the drugs can be inferred. Commonwealth v. Nichols , 4 Mass. App. Ct. 606 (1976).

Street value is relevant as to whether the drugs were for personal use or intended for distribution. An investigative officer qualified as an expert witness is allowed to testify as to "street value." The expert witness should also be prepared to give evidence as to the particular drugs and why possession of the quantity in question is inconsistent with personal use. Commonwealth v. Wooden , 14 Mass. App. Ct. 417 (1982). A large amount of money in the possession of the defendant could be construed as an indication that the defendant was involved in criminal activity. Commonwealth v. Nichols , 4 Mass. App. Ct. 606 (1976).

NOTES ON SEARCH AND SEIZURE

Searches With Warrants

The search of a person or private property and the seizure of material is unreasonable unless the search is authorized by a search warrant, with a few carefully defined exceptions. (See section on searches without warrants.)

A person seeking a search warrant must appear personally before a person authorized to issue search warrants and make an application in the form of an affidavit. The affidavit must contain the facts, information and circumstances which the person, referred to as the affiant, relies on to establish probable cause. M.G.L. c.276 Sec 2B.

A search warrant may issue on probable cause, more than suspicion but less than the evidence necessary to convict. Henry v. United States , 361 U.S. 98 (1959). The affidavit must establish probable cause that the relevant evidence or contraband such as controlled substances, will be found at the designated location. There must be a reason to believe that the premises to be searched are connected with the criminal activity. Commonwealth v. Kaufman , 381 Mass. 301 (1980)

The affidavit must contain sufficient information to satisfy the magistrate that probable cause exists to issue the warrant. Probable cause may be based on either actual observations by the affiant or on information which is entirely hearsay in nature or both. Brinegar v. United States , 338 U.S. 160 (1949).

When the hearsay information is from victims, citizen-witness or other police officers, there is a presumption of reliability. Commonwealth v. Aarhus , 387 Mass. 735 (1982), Commonwealth v. Grzembki , 17 Mass. App. 1029 (1984). The citizen informant, in direct contact with the police, should be distinguished from the anonymous tipster who has no presumption of reliability. Commonwealth v. Anderson , 366 Mass. 394 (1974). The basis of the police officer or witness' information must still be explained in the affidavit. Commonwealth v. Rossetti , 349 Mass. 626 (1965).

Where a police informant is the source of the hearsay information which the affiant relies on to establish probable cause, additional information must be included in the affidavit. In Massachusetts, where a police informant is relied upon, the standard for probable cause must meet the Aquilar-Spinelli standard. Commonwealth v. Upton , 394 Mass. 363 (1985). This requires the affidavit to satisfy a two-prong test: (1) Basis of knowledge and (2) Veracity of the informant. Aquilar v. Texas , 378 U.S. 108 (1964), Spinelli v U.S. 393 U.S. 410 (1969). The affiant must show in the affidavit some of the underlying circumstances which lead him to conclude that the informant was credible or his information reliable and the circumstances underlying the informant's acquisition of the information. Aquilar v. Texas , 378 U.S. 108 (1964). Basically, the affidavit must show how the informant is credible or his information reliable and what constitutes the basis of his knowledge.

In many instances, credibility of a police informant is established by listing in the affidavit past instances where the informant's tips resulted in successful arrests, seizures or convictions. U.S. v. Muckenthaler , 584 F. 2d 240 (8th cir. 1978). If possible, this should include names of persons arrested or convicted and descriptions of types and amounts of contraband seized. Prior arrests are sufficient even without convictions. Commonwealth v. Anderson , 362 Mass. 74 (1972). A simple instance of prior demonstrated accuracy is enough, Commonwealth v. Kaufman , 381 Mass. 301 (1980), as is a seizure of contraband without an arrest enough to show an informant's credibility. Commonwealth v. Kiley , 11 Mass. App. Ct. 939 (1981).

If the informant can not be proven as credible because of past tips, the affidavit must show that the informant's information is reliable. One manner to show reliability of the information is if the informant admits to being a criminal participant with the suspected person. U.S. v. Harris , 403 U.S. 573 (1971). Corroboration of the informant's tip by personal observation by the police may show reliability of the information. In fact, the affidavit should include independent corroboration by the police of the information from the informant. If the informant's tip does not satisfy each aspect of the Aquilar test, other allegations in the affidavit that corroborate the information could support a finding of probable cause. Spinelli v. U.S. , 393 U.S. 410 (1969). In many instances, corroboration involves independent verification of incriminating details of the informant's information. Corroboration may consist of observations of a revealing pattern of activity.

In addition to showing the credibility of the informant or reliability of the information, the affidavit must state the basis of the informant's knowledge. It should explain how the informant knows what he claims to know. Often this is shown by describing in the affidavit the observations of the informant as well as the circumstances surrounding the informant's ability to observe. Commonwealth v. Pellier , 362 Mass. 621 (1972). Detail and precision of the information may imply personal knowledge. Commonwealth v. Kiley , 11 Mass. App. Ct. 939 (1981).

The affidavit must not be based on stale information, it must contain information recent enough to suppose that probable cause exists at the time the warrant is issued. Therefore, there should be mention in the affidavit as to the time frames of the information and observations. It should be noted that exact dates and times are not required, especially since such information may indirectly identify the informant. Often times the affidavit specifies time in general times, such as "within the last three days"; this may be sufficient to show that the information is recent.

The warrant must "particularly describe" the premises to be searched and the articles seized. M.G.L. c. 276 Section 2. The description required must be sufficient enough so as to "ascertain and identify with reasonable effort the place intended". Steel v. U.S. , 267 U.S. 498 (1952). Where a building consists of more than one unit, the specific unit of apartment must be detailed. It should be described so that "nothing is left to the discretion of the officer executing the warrant". Marron v. United States , 275 U.S. 192 (1927). The warrant should specify the floor to be searched, as well as any reference to storage areas, basements or attics if applicable.

For a warrant to include a search of “any person present”, there must be a belief that the persons present are involved in the criminal activity taking place. Commonwealth v Smith, 370 Mass. 335 (1976). However, in public establishments such as a restaurant or bar, a search warrant directed towards the bar and bartender does not authorize a search of the patrons on the premises. Ybarra v Illinois, 444 U.S. 85 (1979). Persons present during the execution of the search warrant may be detained for a reasonable period of time while the search is concluded. Michigan v Summers, 452 U.S. 692 (1981).

Where it is believed that the evidence, such as controlled substances, will be destroyed if an announced entry is made, a “no-knock” warrant may be obtained. A threshold reappraisal of this threat must be made at the scene. Commonwealth Scalise , 387 Mass. 413 (1982).

Every officer to whom a warrant to search is issued shall return the search warrant to the court by which it was issued as soon as it has been served, and in any event not later than seven days from the date of issuance. If a justice of the Superior Court issues a search warrant returnable seven days before a district court named in such warrant, that search warrant shall be returned to the district court as directed. M.G.L. c. 276 Section 3A.

Searches Without Warrants

The United States Supreme Court and the Massachusetts Supreme Judicial Court have expressed a preference for searches and seizures to be made with search warrants. Nonetheless, many searches are made without warrants, according to several well-delineated, narrowly defined exceptions.

Searches without warrants, generally speaking, are permissible where there are exigent circumstances and probable cause. In the absence of the criteria, the fruits of the warrantless search will be suppressed under the Massachusetts Declaration of Rights.

The Plain View Doctrine

The “plain view” doctrine permits officers to seize evidence which comes into plain view without the necessity of obtaining a warrant. This includes stolen property, contraband, and other evidence of crimes. Police Officers must have lawfully gained the vantage at which evidence comes into plain view. Frequent examples include:

1. **Arrest-** evidence which comes into view during the course of an arrest validly made.
2. **A lawful stop of a vehicle or person.**
3. **The execution of a search warrant.** If police are validly on the premises pursuant to a valid search warrant, they may seize incriminating evidence in plain view which may not have been mentioned in the warrant.
4. **Hot Pursuit.** Police in pursuit of a suspect may seize incriminating evidence which comes into plain view.
5. **Inventory search of an impounded vehicle.** Incriminating evidence seized during the routine inventory of an impounded vehicle may be seized, especially where standard procedures are followed.
6. **Booking inventory.** Evidence found while booking a suspect may be seized.

It sometimes said that incriminating evidence seized pursuant to the plain view doctrine must be inadvertently discovered. This simply means that there will be situations where officers may not have had prior probable cause to name certain evidence in a warrant, but come across such evidence while lawfully in the performance of their duties.

For example, police officers may have a valid warrant for an auto body shop which they believe contains stolen car parts. If during the course of the search for the stolen car parts, they inadvertently discover a quantity of cocaine, the cocaine will be admissible into evidence even though it was not named in the warrant.

Automobile Searches.

Because of the inherent mobility of automobiles, the Supreme Court has stated that police officers need not obtain a warrant in order to search motor vehicles provided that there is probable cause to believe that the vehicle contains contraband or other evidence of a crime, and that exigent circumstances exist.

Police officers who stop a car on a highway may search it without a warrant if there is probable cause to believe that incriminating evidence is present.

The area of most controversy involves the search of a car parked in a public place. Where no exigency exists the safest course is to get a warrant.

A warrant need not be obtained if there is a possibility that the car was stolen. Nor is a warrant needed if there is a possibility that the defendant or others might tamper with the car, such as when the defendant is at large, and the car is in a public location.

If the car is parked on private property, however, the safest course is to post a guard, and obtain a warrant.

A lawful search of the car may extend to compartments such as the trunk, glove compartment and engine.

More controversial has been the question of whether the police may search containers, opened or closed, that might contain contraband or incriminating evidence.

The United States Supreme Court has ruled that if there is probable cause to search the car, there is probable cause to search containers within the car. The exigencies that allow the police to search the entire automobile support the search of every container found therein. U.S. v. Ross, 456 U.S. 798, 816 (1982).

Where a car is lawfully impounded as a result of an arrest, its contents may be inventoried as part of a standard and routine administrative procedure. If such inventory is not according to a standard procedure, the evidence seized may be suppressed.

The classic situation occurs when the police receive a description of an automobile escaping from a robbery scene with an armed gunman inside. If this automobile is stopped on the road, the police may arrest the occupants and search the car at the scene, or they may tow it to the police station and search it there.

Hot Pursuit.

A search may be conducted without a warrant in circumstances that qualify as an emergency. The most familiar exigent circumstance is the hot pursuit of a fleeing suspect. Where there is the threat of immediate destruction of evidence, police may conduct a search without a warrant.

Also if the police are in hot pursuit of a fleeing suspect, and the suspect flees into his home, a warrantless search of the suspect and the home may be upheld.

For example, if a police officer observes a youth snatch a handbag from an elderly lady, and then flee into a housing project, the police may pursue the youth into the project and into the youth's residence, and may search the residence for the handbag without a warrant.

Searches Made With Consent

A defendant may waive his personal right under the Fourth Amendment to be free from any warrantless search of his property, and consent, freely and intelligently given by the defendant or by a proper third person, will waive the protection of the Fourth Amendment. Commonwealth v. Cantalupo, 380 Mass. 173, (1980).

In determining whether the suspect has given his consent to search, the crucial question is whether the defendant truly consented to the search and not whether it was reasonable for the police officers to suppose that the suspect did.

Also, the consenting party may put limitations on the consent, either by express language or by implication, but the ultimate question is whether, in light of all the circumstances, a man of reasonable caution would be warranted in the belief that some limitation was intended by the consent given.

The voluntariness of the consent is a question of fact to be determined in the circumstances of each case. Several factors are generally considered in determining whether a suspect has voluntarily consented to a search. No single factor will suffice in and of itself, and all the circumstances of a given case must be considered.

Among the factors which the courts will review are the following:

1. **Advising the suspect of the right to refuse consent.** Police officers are not required to so advise suspects, but a court will look more favorably on a consent-based search if the suspect was advised that he may refuse.
2. **Submission to authority.** A suspect's consent must amount to more than mere submission or acquiescence to authority. If it appears that a defendant consents to a search only because of fear of armed police officers, this will not be considered a valid consent.
3. **Fraud as a basis for consent.** If trickery or subterfuge is used to obtain consent, the search will not be deemed valid.
4. **Defendant in custody.** The fact of a suspect being held in custody at the time he gave consent does not necessarily mean that the consent is invalid, but the courts view with caution such consent.

It is also important to note that consent may be given by a third party who has mutual control over premises or effects. Such consent has been deemed to apply against the absent non-consenting person who shares control.

For example, a spouse may give oral or written consent to search the marital residence for evidence against the other spouse, provided that the consenting spouse is present and living in the house at the time. Also a roommate may give consent to search common areas shared with another roommate. Commonwealth v. Martin, 358 Mass. 282 (1970), Commonwealth v. Rodriguez, 364 Mass. (1973).

Stop And Frisk

Under the Fourth Amendment, an arrest must be based on probable cause. However, in certain situations, even where the police officer lacks sufficient information necessary for probable cause, a brief stop and frisk for weapons may be considered reasonable. Terry v. Ohio, 392 U.S. 1 (1968).

A police officer may detain a suspect briefly for questioning although he does not have probable cause to believe the suspect is involved in criminal activity, as required for an arrest. M.G.L.c. 41, Section 98 provides that a police officer may make a brief threshold inquiry if the conduct of the person leads an officer to believe that the suspect has committed, is committing, or is about to commit a crime. Commonwealth v. Thibeau , 384 Mass. 762 (1981).

Threshold inquiry may also arise when police are searching for a perpetrator of a crime, and have a description of the person or vehicle involved.

The threshold inquiry is initiated by a stop of a person. The brief stop of a suspicious individual in order to determine his identity or maintain the status quo while obtaining more information, may be reasonable in light of facts known to the officer at the time. Adams v. Williams , 407 U.S. 143 (1972). The police officer's action must be based on "specific and articulable facts" and the specific reasonable inferences which follow from such facts in light of the officer's experience. Commonwealth v. Silva , 366 Mass. 402 (1974).

There are a number of factors which would justify a stop and protective frisk; but rarely is one factor alone sufficient. The following are examples of "sufficient and articulable" facts that have been found to justify a stop and inquiry:

1. Knowledge that a specific crime has been committed,
2. Furtive gestures observed prior to signalling the stop,
3. Suspicious presence at a late hour at an unusual location,
4. Visible apprehension at the approach of police,
5. Suspicious behavior,
6. Knowledge of the suspect's reputation for criminal activity,
7. Proximity to the scene of the crime,
8. Knowledge peculiar to an officer's training and experience,
9. "Immediately verifiable" information from an informant
10. Resemblance to a description of a person or vehicle involved in a crime,
11. Lack of fit between suspect and neighborhood,
12. Activity inappropriate to its setting,
13. Traffic violation.

An officer who reasonably stops an individual may conduct a limited search of the person for weapons. The scope of the search is confined to what is minimally necessary to determine if the suspect is armed. In most instances, the search is limited to a pat down of the outer clothing. The search may extend beneath a person's clothing only to discover if a suspicious object is in fact a weapon. Terry v. Ohio , 392 U.S. 1 (1968). The object must reasonably appear to be a weapon. Commonwealth v. Silva , 366 Mass. 402 (1974). If police have no reason to believe a suspect is armed, a protective search is not justified. Commonwealth v. Cantalupo , 380 Mass. 173 (1980). However, where police are investigating a serious crime, an officer's apprehension of danger is reasonable.

The protective search is not limited to the person but includes areas within the person's immediate control. A frisk may extend to a suspect's vehicle if it is confined to areas in which a weapon may be accessible and if police have a reasonable belief that the occupant may otherwise gain control of a weapon. Commonwealth v. Almeida, 373 Mass. 266 (1977).

Search Incident to Lawful Arrest

An exception to the requirement of a search warrant is where there is a search incident to a lawful arrest. In order for there to be a reasonable search incident to an arrest, the arrest must be lawful, that is, preceded by probable cause. The arrest must precede the search; if the arrest is being used as an excuse for the search, the arrest and search is invalid. Once a lawful arrest is made, a police officer has full authority to make a search of the defendant regardless of the type of offense. U.S. v. Robinson, 414 U.S. 218 (1973), Gustafson v. Florida, 414 U.S. 260 (1973). The search of the arrested person does not depend on whether there is an indication that the person possesses weapons or evidence. Therefore, where a police officer has probable cause to arrest a person, a full search of his person is permissible. The scope of the search is confined to the person and to places and personal property under his immediate control or reach. Chimel v. California, 395 U.S. 752 (1969). The "immediate control" test is strictly construed. Where a person is arrested on the steps of his house, this exception to the search warrant requirement does not allow the search of the house. Nor, when an arrest is made inside the house is a search of the person's vehicle allowed. However, the exception of a search incident to arrest does apply when a person is arrested in a motor vehicle. For instance, where police have made a lawful arrest of an occupant of a car, they may search the passenger compartment as part of the search incident to arrest. The search may extend to containers found in the passenger's area, whether open or closed. N.Y. v. Belton, 453 U.S. 454 (1981). It should be noted that any search incident to arrest must be "substantially contemporaneous" with the arrest. Shipley v. California, 395 U.S. 818 (1969).

M.G.L. 276, Section 1 attempts to limit the admissibility of evidence found in the search. M.G.L.c. 276, Section 1 states that the search incident to the arrest may be made only for the purpose of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its obstruction or concealment. Basically, the full search incident to a lawful arrest is reasonable, but the admissibility of evidence not related to the crime which justifies the arrest depends on whether there is a permissible basis for the search apart from a search incident to arrest.

